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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-826

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

v.

CITY OF FAIRFAX, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Defendants Industrial Development Authority of Fairfax County, Virginia, Fairfax Hospital Association and Commonwealth Doctors Hospital, Inc. hereby pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered August 22, 1977, petition for rehearing and suggestion for rehearing *en banc* denied November 2, 1977. This case presents an important and special issue concerning the application of the state-action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), to the alleged anticompetitive activities of local governmental entities. This case thus involves precisely the question presently before this Court in *City of Lafayette, La.* v. *Louisiana*

Power & Light Co., 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977) (Docket No. 76-864) and for which review is sought in *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440).

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia is reported at 1976-2 CCH Trade Cas. ¶ 60,999 (E.D. Va. 1976) and is reproduced in the accompanying Appendix at 27a. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 1977-2 CCH Trade Cas. ¶ 61,598 (4th Cir. 1977) and is reproduced in the accompanying Appendix at 1a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered August 22, 1977. On September 6, 1977, defendants filed a timely motion for rehearing and suggestion for rehearing *en banc*. On September 15, 1977, the Court of Appeals entered an Order denying both the petition for rehearing and suggestion for rehearing *en banc*. (App. 26a). On September 16, 1977, the Court of Appeals rescinded its September 15, 1977 Order and instead denied only the petition for rehearing. (App. 23a). On November 2, 1977, the Court of Appeals entered an Order denying both the suggestion for rehearing *en banc* and the petition for rehearing. (App. 22a). Upon motion by defendants, the Court of Appeals stayed its mandate on November 17, 1977, so as to permit defendants to file a petition for a writ of *certiorari* with this Court. (App. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether Congress intended that the Sherman Act apply to the legislative decision of the County government for Fairfax County, Virginia, to lease a newly acquired hospital to the County-created, non-profit Fairfax Hospital Association, for operation in conjunction with other County-owned hospitals and health care facilities.

STATUTES INVOLVED

Sections 1, 2 and 3 of the Sherman Act, as amended, 15 U.S.C. §§ 1, 2, 3 (Supp. 1975 at 829), are set forth in the accompanying Appendix at 37a.

The Virginia Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 *et seq.*, Vol. 3A at 471-80 (1973), as amended (Supp. 1977 at 193-199), is set forth in its entirety in the accompanying Appendix at 39a.

The Virginia Hospital Authorities Law, Va. Code § 32-212 *et seq.*, Vol. 5A at 338-50 (1973), as amended (Supp. 1977 at 176-84), is set forth in pertinent part in the accompanying Appendix at 67a.

The Virginia Hospital or Health Center Commission Act, Va. Code § 32-276 *et seq.*, Vol. 5A at 351-55 (1973), as amended (Supp. 1977 at 184-85), is set forth in its entirety in the accompanying Appendix at 57a.

STATEMENT OF THE CASE

A. The Activity Alleged to Be in Violation of the Sherman Act

Plaintiffs (six physicians, one oral surgeon, and the City of Fairfax, Virginia) commenced this private antitrust action on December 12, 1975, in the United States District Court for the Eastern District of Virginia. Subject matter jurisdiction of the District Court over the

federal claims was premised on 28 U.S.C. §§ 1331, 1337 (1970). Pendent jurisdiction was alleged over a state claim.

This case grows out of a sequence of events which culminated in the acquisition of the assets of defendant Commonwealth Doctors Hospital, Inc. ("CDH"), a private, for-profit hospital, by the County-created defendant, Industrial Development Authority of Fairfax County, Virginia ("IDA") and the subsequent leasing of Commonwealth Doctors Hospital ("Commonwealth"), the principal asset of CDH acquired by IDA, to the County-created Fairfax Hospital Association ("FHA").

In their complaint plaintiffs allege that the *leasing* of Commonwealth to FHA by IDA would constitute a restraint of trade, monopolization and a contract in restraint of trade in violation of Sections 1, 2 and 3 of the Sherman Act. Specifically, Count I alleges that the *leasing* of Commonwealth would eliminate competition between Commonwealth and Fairfax Hospital in violation of Section 1 of the Sherman Act. Count II of the complaint alleges that, by *leasing* Commonwealth from IDA, FHA has endeavored to eliminate competition between Fairfax Hospital and Commonwealth and thereby has attempted to monopolize and monopolized in violation of Section 2 of the Sherman Act. Count III alleges that the *leasing* of Commonwealth by the County's IDA to FHA constitutes a contract and combination in restraint of trade between the State of Virginia and the District of Columbia in violation of Section 3 of the Sherman Act.[1] (App. 5a). In their prayer for relief plaintiffs did not seek damages but instead sought only to enjoin, under Section 16 of the Clayton Act[2] the leasing of Commonwealth to FHA.

[1] Count IV of the complaint alleged that IDA was created contrary to the laws of Virginia by the Fairfax County Board of Supervisors.

[2] 15 U.S.C.A. § 26 (Supp. 1977)

(App. 2a). Plaintiffs have repeatedly made clear that they do *not* challenge the acquisition of Commonwealth by IDA or even the continued ownership of Commonwealth by IDA. The *only* activity which is challenged is the leasing of Commonwealth to FHA. (App. 5a, 8a, 33a).

B. Proceedings Below

On February 20, 1976, and after extensive pretrial discovery,[3] defendants filed a motion for summary judgment, on the ground that the leasing of Commonwealth to FHA was a public act by instrumentalities of the State of Virginia and thus not subject to antitrust attack under the state-action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943).[4] On March 5, 1976, plaintiffs filed a cross-motion for summary judgment seeking, *inter alia*, a judgment that the leasing of Commonwealth by IDA to FHA was not exempt under the state-action doctrine. At oral argument on these motions and in response to an inquiry from the court, all parties expressly agreed that there were no disputed issues of fact on the state-action issue. (App. 2a).

On May 3, 1976, the District Court issued a memorandum opinion and order granting defendants' motion for summary judgment, holding that the leasing of Commonwealth to FHA was valid state action and therefore immune from the antitrust laws.[5] (App. 33a-34a). The Dis-

[3] Defendants have responded to three sets of interrogatories, a request for admissions and a request for production of documents. Plaintiffs have also taken numerous depositions.

[4] Defendants also moved for summary judgment on the additional grounds that plaintiffs lacked standing to sue under Section 16 of the Clayton Act, 15 U.S.C.A. § 26 (Supp. 1977), and that the leasing of Commonwealth by IDA was the type of exclusive leasing arrangement which does not violate the antitrust laws.

[5] Relying on the Fourth Circuit's decision in *Hospital Building Co.* v. *Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975), *rev'd*, 425 U.S. 738 (May 24, 1976) prior to this Court's reversal,

trict Court specifically noted that "[e]ach party agrees there are no disputed facts and that the matter is ripe for decision." (App. 27a).

In a split decision rendered August 22, 1977, the Court of Appeals for the Fourth Circuit reversed. (App. 1a). On the state-action issue, Senior District Judge Wyzanski, sitting by designation, and Judge Widener each wrote separate opinions for reversal. (App. 2a, 11a). Judge Hall wrote a separate dissenting opinion on the state-action issue.[6] (App. 17a). On November 2, 1977, after a poll had been taken and over the dissent of Judge Hall, the Court of Appeals denied defendants' petition for rehearing and suggestion for rehearing *en banc*. (App. 22a). On November 17, 1977, the Court of Appeals stayed its mandate to allow defendants to seek a writ of *certiorari* from this Court. (App. 21a).

C. Statement of Undisputed Facts

In 1946 the Virginia legislature enacted the Hospital or Health Center Commission Act, Va. Code § 32-276 *et seq.* (Supp. 1977) (App. 57a), which permitted each city, county and town to set up a hospital or health center commission "if it . . . shall find that the public health and welfare . . . require the acquisition, construction or operation of public hospital facilities for the inhabitants

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the District Court also found, *sua sponte*, that the alleged anticompetitive conduct failed to satisfy the interstate commerce jurisdictional requirements of the Sherman Act. (App. 30a-32a). The District Court further held that the injuries alleged by plaintiffs were too remote to confer standing to sue under Section 16 of the Clayton Act, 15 U.S.C. § 26. (App. 33a). In addition, the District Court dismissed without prejudice the state claim contained in Count IV. (App. 34a-35a).

[6] The Court of Appeals further reversed the District Court's holdings that plaintiffs lacked standing to sue under Section 16 of the Clayton Act and that there was insufficient interstate commerce involved for Sherman Act jurisdiction. (App. 5a-6a).

thereof." (Va. Code § 32-277; App. 57a-58a). In 1947 Fairfax County created such a Hospital and Health Center Commission. (App. 3a). In 1955 this Commission created FHA as a non-profit corporation organized exclusively for charitable, scientific and educational purposes, and for the specific purpose of operating, under a lease agreement, the then-planned Fairfax Hospital. Fairfax Hospital was completed in 1960 and is owned entirely by the County. (App. 27a-28a). Also in 1960 the Board of Supervisors of Fairfax County, the governing body of the County, and FHA signed a lease agreement, which continues to the present, whereby the County leased the hospital site and facilities to FHA for $1 per year. (App. 27a). In addition to Fairfax Hospital, FHA also leases from the County and operates on the County's behalf, the newly constructed Mount Vernon Hospital and the ACCESS ambulatory health care facility in Reston, Virginia. (App. 28a). Funds for these new facilities were obtained through a bond referendum for $32.5 million recommended by the Hospital and Health Center Commission and the Fairfax County Board of Supervisors and approved by the voters of Fairfax County in 1967. (App. 27a-28a). These bonds are repaid from tax funds of the County.

The FHA Articles of Incorporation provide that any adult member of the public may become a member of FHA for a five dollar annual membership fee. (App. 3a). Under FHA's charter, the Fairfax County Board of Supervisors designates three members of FHA's Board of Trustees.[7] The lease agreement between FHA and the County provides that FHA must receive explicit prior approval from the Board of Supervisors for any capital expenditure above $100,000. The lease further provides that the County has the right to review and suggest

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[7] Other trustees are appointed by the Fairfax County Medical Society, the medical staffs of Fairfax Hospital, Mount Vernon Hospital, Commonwealth Doctors Hospital and the Auxiliary of the Fairfax Hospital. The remaining trustees are elected by the members of FHA.

revisions in FHA's budget and that the County receive prior notification of any proposed rate increase. (App. 3a). Upon termination of the leases under which FHA operates the County's hospitals, all FHA assets automatically become County property. (App. 28a). FHA "exists solely to serve the public." (App. 28a).

In July 1974, FHA was contacted by members of the Board of Directors of CDH and advised that the assets of CDH were for sale and that purchase offers from several large national proprietary hospital chains were being received. On July 24, 1974, the Board of Trustees of FHA appointed a committee to investigate and make recommendations regarding a possible acquisition of Commonwealth for the County. After the committee's findings in favor of the acquisition[8] were reviewed by the FHA Board of Trustees at a special meeting on September 25, 1974, the Board voted to extend an offer to purchase the assets of CDH for $7.5 million, conditioned upon execution by the Board of a definitive purchase agreement. On September 26, 1974, a letter of intent outlining the FHA proposal was sent by FHA to the CDH Board of Directors. At a meeting on September 27, 1974, the CDH Board of Directors agreed in principle to the FHA offer, conditioned upon approval by the CDH stockholders. (App. 28a).

The FHA Board of Trustees also voted at the September 25 special meeting that prior to execution of a definitive purchase agreement for the CDH assets, it should explore the most favorable method of financing the acquisition. After study, the FHA staff, along with

[8] The *ad hoc* committee "reported to the trustees of the FHA that acquisition of the CDH would further the community interest in high quality and efficient health care by incorporating the CDH facilities into a unified County health care system and would result in the lowering of the cost of health care in the community." (App. 28a).

representatives of Fairfax County and County financial advisors concluded that the acquisition could be best accomplished by County acquisition of the CDH assets through an industrial development authority created by the County under the Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 (Supp. 1977). (App. 39a). In this way the industrial development authority could issue its own tax-exempt bonds to finance the acquisition. On October 21, 1974, the Fairfax County Executive informed the Fairfax County Board of Supervisors of this study and recommended that it create an industrial development authority for the purposes of acquiring the CDH assets for the County, issuing bonds to finance the acquisition and leasing Commonwealth to FHA for operation along with the County's other health care facilities. (App. 28a).

In a public session held on October 28, 1974 and "in accordance with the proposals of the County staff" (App. 28a) and the recommendation of the County Executive, the Fairfax County Board of Supervisors enacted an emergency ordinance creating IDA for the specific purpose of raising funds to acquire the CDH assets. This ordinance expressly directed IDA to lease Commonwealth to FHA for operation on behalf of the County. (App. 8a, 28a).

On November 13, 1974, the Board of Trustees of FHA held a special meeting for the purpose of considering a proposed purchase agreement between CDH and FHA. The Executive Vice President of FHA advised the Board that the Fairfax County Board of Supervisors had established IDA, but that IDA could not proceed further until a definitive agreement was signed between FHA and CDH. The Board of Trustees then adopted a resolution approving the definitive agreement which was signed by FHA and CDH on November 18, 1974.

On December 9, 1974, and after a public hearing, the Fairfax County Board of Supervisors adopted the permanent IDA ordinance. On September 8, 1975, the Board of Supervisors voted their approval of the lease between IDA and FHA, as required by the ordinance creating IDA. The Board of Directors of IDA met on December 23, 1975 and unanimously approved the contract to purchase the CDH assets, the trust indenture and resolutions approving the lease agreement; and authorized issuance of the bonds and acceptance of title of the CDH assets. Closing took place on January 8, 1976 where the contract between FHA and CDH was assigned to IDA, IDA purchased and took title to the CDH assets and IDA and FHA executed the lease agreement. (App. 28a-29a).

These basic facts formed the basis of the District Court's grant of summary judgment for defendants on the state-action issue and are not disputed by the parties.

SUMMARY OF ARGUMENT

The legal standard applied by the court below is inconsistent with the recent decisions of this Court and is in direct conflict with the reasoning adopted by the Court of Appeals for the Fifth Circuit in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977), presently pending before this Court, and by the Courts of Appeals for the Third and Seventh Circuits in *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975), and *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440). Each of these decisions was rendered after *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). A decision by this Court in *Lafayette* will require a reversal here unless this Court rejects the reasoning of the Fifth Circuit, the position of petitioners, and the *amicus* position of the Department of Justice and holds that for purposes of the state-action doctrine there is no difference between the acts of local municipalities and the acts of completely private parties.

The decision of the court below is also in direct and irreconcilable conflict with the decisions of the Courts of Appeals for the First, Sixth, Seventh and Eighth Circuits which have ruled that Congress did not intend that the Sherman Act reach the activities of a local government in operating publicly imbued property or in executing monopolistic leasing arrangements with private concerns. While these decisions were rendered prior to *Goldfarb*, the results obtained are consistent with this Court's interpretation of the common law as well as with the Court's recent decisions construing the state-action doctrine. These decisions are also consistent with the reasoning of *Duke & Co.*, *Lafayette* and *Kurek*. Depending on the manner of this Court's resolution of *Lafayette*, these cases require a reversal of the Court of Appeals below.

ARGUMENT

A. The Reasoning of the Court of Appeals Is Inconsistent with the Recent Decisions of This Court and Is In Conflict with the Reasoning of the Courts of Appeals for the Third, Fifth and Seventh Circuits.

The central question posed by this Petition is whether the purported anticompetitive actions of local municipalities are subject to the antitrust laws under the *Parker* v. *Brown* state-action doctrine as developed by this Court in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); and *Bates* v. *State Bar of Arizona*, —— U.S. ——, 97 S.Ct. 2691 (1977).[9]

[9] As noted, this precise question is presently before this Court in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977). The same question has also been presented to the Court in a petition for a

This Court's recent decisions in *Goldfarb*, *Cantor* and *Bates* establish that for purposes of applying the state-action doctrine of *Parker* v. *Brown*, there is a fundamental distinction between the anticompetitive activities of a State and the anticompetitive activities of a private party. In essence, under *Parker* and *Bates*, a state's conduct is not subject to the Sherman Act if it is pursuant to a valid public purpose.[10] In contrast, *Goldfarb* and *Cantor* make clear that wholly private restraints must be specifically compelled by the state pursuant to a specific state purpose. In *Goldfarb*, for instance, the Court refused to apply the state-action doctrine to a fee schedule arrangement established and maintained by the private bar association because neither the Virginia legislature nor its agent in Virginia had instituted or compelled such an arrangement. (421 U.S. at 789-90).

Similarly, in *Cantor*, this Court held that the state-action doctrine did not apply to an anticompetitive light bulb giveaway program instituted by a private utility company even though the program had been approved by the state regulatory commission and could not be changed without the state commission's approval. The plurality opinion carefully distinguished between private conduct and state conduct. (428 U.S. at 591 n.24). Indeed, the plurality opinion, as joined by Mr. Chief Justice Burger, specifically noted that the issue presented in *Cantor* was whether "*private* conduct required by state law is exempt from the Sherman Act." (428 U.S. at 592; emphasis supplied).

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writ of *certiorari* filed in *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440).

[10] *See also California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 516 n.3 (1972) (Stewart, J., concurring) ("when a monopoly or restraint of trade is the result of valid governmental action, there cannot be an antitrust violation.").

The distinction between private and public conduct is further highlighted by this Court's decision in *Bates* where the Court unanimously distinguished *Cantor* and held that anticompetitive conduct of the Arizona Supreme Court in prohibiting advertising by lawyers was beyond antitrust attack. In *Bates* the Court distinguished *Cantor* on the ground that in *Cantor* "there was no suggestion that the light bulb program was . . . a response to health or safety concerns." (97 S.Ct. at 2697). The Court further noted that in *Cantor* the private utility's program was "instigated by the utility with only the acquiescence of the state regulatory commission." (97 S.Ct. at 2698).

The different results obtained in *Cantor* and *Bates* make clear that a state's anticompetitive conduct is fundamentally different from the anticompetitive conduct of a private party. As Mr. Chief Justice Burger stated in *Goldfarb*:

> In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Court held that an anticompetitive marketing program which 'derived its authority and efficacy from the legislative command of the state' was not a violation of the Sherman Act because *the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. Id.*, at 350-352; *Olsen* v. *Smith*, 195 U.S. 332, 344-345 (1904).
>
> (421 U.S. at 788; emphasis supplied).

In each case, as Mr. Chief Justice Burger points out in his concurring opinion in *Cantor*, the focus must be on the "challenged *activity*, not upon the identity of the *parties* to the suit." (428 U.S. at 604; emphasis in original).

Since *Goldfarb*, the Courts of Appeals for the Third, Fifth and Seventh Circuits have specifically addressed the question of whether the actions of a local municipality

come within the ambit of the state-action doctrine. *See Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975); *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977), and *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440). The rule of these cases was most succinctly put by the Fifth Circuit in *Lafayette*, where the Fifth Circuit explained that the doctrine does not automatically exempt a municipality; rather, "*[t]he test now is whether the challenged action is the type of activity which the legislature intended the governmental body to perform.*" (532 F.2d at 435; emphasis supplied). The *Lafayette* court further explained that "it is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent." (532 F.2d at 435).

Lafayette was decided prior to *Cantor*, and this Court has granted *certiorari* in the case. However, the analysis stated in *Lafayette* has been applied by the Seventh Circuit in the very recent post-*Cantor* case of *Kurek* v. *Pleasure Driveway & Park District of Peoria*. Relying on *Lafayette* and the Third Circuit's decision in *Duke & Co.* v. *Foerster*, the court in *Kurek* stated:

> We agree with the Third and Fifth Circuits that an adequate state mandate for anticompetitive activities of subordinate governmental units 'may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity.' (557 F.2d at 590, *quoting Duke & Co., Inc.* v. *Foerster*, 521 F.2d at 1280).

The analysis employed by the Third, Fifth and Seventh Circuits in *Duke & Co.*, *Lafayette* and *Kurek* also has

been adopted by the Department of Justice in its *amicus curiae* brief filed with this Court in *Lafayette*. In that brief the Department concludes that a distinction must be recognized between privately imposed restraints and restraints imposed by municipalities:

> A refusal to recognize any distinction between municipally imposed and privately imposed restraints would interfere with the States' selection of the subordinate public bodies to carry out governmental functions; the States must act through agents, and States have chosen to delegate a significant portion of their regulatory authority to municipal governments. To apply the federal antitrust laws to all municipal decisions would be to hold, in practical effect, that certain state powers are not delegable. (*Amicus* Brief at 10).

Defendants respectfully submit that, in reversing the District Court, both Judge Wyzanski and Judge Widener applied a legal standard inconsistent with the recent construction given the state-action doctrine by this Court in *Bates* and in direct conflict with the reasoning of *Kurek*, *Lafayette* and *Duke & Co.*

Apparently speaking for the court,[11] Judge Wyzanski holds that while IDA is "a state agency" (App. 8a), the leasing of Commonwealth by IDA is not "state action." While recognizing that the Fairfax County Board of Supervisors created IDA by ordinance for the specific purpose of acquiring Commonwealth and leasing it to FHA and the IDA is but a "creature" of the County (App. 9a),[12] Judge Wyzanski reasons that the ordinance of a local government is not analogous to "a legislative coercive

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[11] Judge Wyzanski's separate opinion instructs that "further proceedings to be in accordance with this opinion." (App. 10a).

[12] Cf. *Board of Supervisors* v. *Alexandria Water Co.*, 204 Va. 434, 441, 132 S.E.2d 440, 444 (1963) (water authority created by Fairfax County Board of Supervisors is the "agent" of the Board of Supervisors). *See* note 16, *infra*.

command nor to the legislative regulation of private conduct." (App. 9a). In the absence of such a coercive command "from the legislature of Virginia" (App. 8a), Judge Wyzanski holds that the challenged leasing by the County and its IDA could not be exempt under the state-action doctrine. Judge Wyzanski thus concludes that the state-action doctrine is applicable in this case only if "the Commonwealth of Virginia through Fairfax County is actually exercising complete control over Fairfax County Hospital, and that every significant aspect of that hospital is operated as a state agency. . . ." (App. 10a).

In so holding, Judge Wyzanski plainly rejects the test employed in *Duke & Co.*, *Lafayette* and *Kurek*. Such a restrictive standard is not required by *Goldfarb* and *Cantor* since the challenged conduct in those cases was that of *private* parties. Indeed, by requiring that a municipality act only at the direct compulsion of the legislature, Judge Wyzanski apparently makes no differentiation between wholly private conduct and conduct of a municipality—both must be "commanded" by the state legislature. This refusal to differentiate between private and public conduct is not only without support in the case law, but it is also contrary to *Parker* and *Bates* which teach that Congress did not intend that the Sherman Act apply to restraints imposed by a public body to achieve a public purpose.

In his separate opinion, Judge Widener, while concurring in the result, expressly disagrees with the analysis of Judge Wyzanski, stating:

> I . . . do not agree with Judge Wyzanski's apparent conclusion that a local governmental body must as a matter of fact be acting at the compulsion of the State, almost its alter-ego, in order to qualify for a *Parker* exemption. (App. 16a).

Instead, Judge Widener would hold that *Lafayette* "states approximately the correct rule." (App. 16a). However,

apparently overlooking the Seventh Circuit's post-*Cantor* decision in *Kurek*, Judge Widener "would add to the rule of *City of Lafayette* that in addition to the prerequisites stated in that case the activity involved *must meet one of the analyses set forth in Cantor.*" (App. 16a; emphasis supplied).

The hybrid standard imposed by Judge Widener is difficult to understand. The test employed by the Fifth Circuit in *Lafayette* pertained only to those anticompetitive activities undertaken by a local municipality. In contrast, while the anticompetiitve light bulb program involved in *Cantor* was "required" by a public regulatory commission, the program itself was a wholly private restraint on trade—no governmental activity was involved in the restraint itself. In such a situation the Court held [13] that even where the private conduct was required by state law, such conduct would not be exempt unless (1) "it would be unfair to hold a private party responsible for his conduct" (428 U.S. at 595), or (2) such private conduct was necessary in order for a state regulatory scheme "to function effectively." (428 U.S. at 598).

By requiring that "one of the analyses of *Cantor*" (App. 16a) be satisfied where the challenged activity is a lease by a "state agency," Judge Widener apparently believes that the only distinction between the activities of municipalities and the conduct of private parties is that a municipality must also show that its activities are supported by an "adequate state mandate" required in *Lafayette*. Indeed, Judge Widener would apply the same test to both local and statewide governmental entities.[14]

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[13] This portion of the plurality opinion was joined by Mr. Chief Justice Burger.

[14] Judge Widener states that "I think the activities of a governmental entity, *State or local*, may qualify for a *Parker* exemption if they meet one of the analyses of *Cantor*." (App. 16a; emphasis supplied).

This standard plainly is in conflict with *Lafayette*. It most certainly is not required by *Cantor*.

In this case, the essence of the challenged activity is the decision by the Fairfax County Board of Supervisors to lease one of its County hospitals, Commonwealth, to its County-created FHA, for operation within the County's public hospital system. By failing to apply the fundamental distinction between anticompetitive *private* conduct and anticompetitive *state* conduct, the court below improperly concluded that the state-action doctrine is applicable in this case only if the decision to lease Commonwealth to FHA by the Board of Supervisors was "commanded" by the Virginia legislature. As demonstrated, such a command would have been necessary only if the decision to lease had been a *private* act. Since the Board's decision to lease Commonwealth was an act by a local *public* body, the leasing is not subject to the Sherman Act if it is supported by an "adequate state mandate" which "'may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity.'" *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d at 590. This is precisely the analysis employed by the District Court (App. 34a), and concurred in by Judge Hall in dissent. (App. 18a).[15]

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[15] The participation of the quasi-governmental FHA in the lease does not make the County's ultimate legislative decision to lease Commonwealth any less of a County act. As the plurality noted in *Cantor*, "in *Parker* v. *Brown* itself, there was significant private participation in the foundation and effectuation of the [state] program." (428 U.S. at 592 n.25). The role of FHA and CDH in suggesting the leasing arrangement adopted by the Board of Supervisors is protected under the *Noerr-Pennington* doctrine, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 n.17 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965). *See, e.g., Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 229 (7th Cir. 1975). Indeed, in this case it would make little sense to rule that the lessor (the County) is exempt but hold that the lessee (FHA) is subject to the Sherman Act where the lessee operates all other County health facilities on behalf of the County. In short, FHA's participation in the lease is essential if the County is to realize its goal of creating "a county-wide system of public health services." (App. 34a). *See Cantor* v. *Detroit Edison Co.*, 428 U.S. at 595-98.

The undisputed facts of this case show that the Fairfax County Board of Supervisors' decision to acquire Commonwealth and lease it to FHA was supported by an "adequate state mandate." This mandate is evidenced by three state statutes.

In 1946, the Virginia legislature enacted the Virginia Hospital Authorities Law, Va. Code § 32-212 *et seq.* (Supp. 1977) (App. 67a), as a response to federal funding available under the Hill-Burton Act, 42 U.S.C. § 291 *et seq.* (1970). In Section 32-213 of the Law, the Virginia legislature found that there is a public need for the "construction, maintenance and operation of adequate hospital facilities" and that this need "*cannot be remedied by the ordinary operations of private enterprises* ...." (Emphasis supplied). (App. 67a).

In further response to the Hill-Burton Act, the Virginia legislature also passed in 1946 the Hospital or Health Center Commission Act, Va. Code § 32-276 *et seq.* (Supp. 1977), which permitted each city, county and town to set up a hospital or health center commission "if it . . . shall find that the public health and welfare . . . *require the acquisition, construction or operation of public hospital facilities for the inhabitants thereof.*" (Va. Code § 32-277; emphasis supplied; App. 57a-58a). As noted, in 1947 Fairfax County appointed such a Hospital and Health Center Commission which created FHA in 1955 for the purpose of operating, under lease from the County, the then-planned Fairfax Hospital.

The third state statute is the Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 *et seq.*

(Supp. 1977) (App. 39a), which authorizes political subdivisions of the State to set up Industrial Development Authorities to acquire, own, lease and dispose of properties for the promotion of the "safety, health, welfare, convenience or prosperity" of Virginia citizens. (Va. Code § 15.1-1375; App. 42a). Such industrial development authorities are specifically empowered to acquire, own and lease medical facilities "including, but not limited to office and treatment facilities" (Va. Code § 15.1-1374(d); App. 39a), and other enterprises, such as "scientific laboratories, including, but not limited to the practice of medicine . . . ." (Va. Code § 15.1-1374(j); App. 41a). Pursuant to this legislation, the Fairfax County Board of Supervisors conducted a public hearing and voted to create IDA for the purpose of acquiring and leasing Commonwealth to FHA.[16]

In enacting the emergency ordinance creating IDA for the purpose of acquiring Commonwealth and leasing it to FHA, the Fairfax County Board of Supervisors sought to promote the health, safety and welfare of the citizens of Fairfax County by creating a coordinated hospital health care system in Fairfax County. (App. 28a, 34a). Such a determination is clearly "the type of activity which the [Virginia] legislature intended the [Fairfax County Board of Supervisors] to

[16] Contrary to Judge Wyzanski's characterization of this creation of IDA as an action of the "executive branch" (App. 9a), it is clear that in creating defendant IDA the Fairfax County Board of Supervisors was acting in a legislative capacity and as a "legislative arm of the state." *IDA* v. *Suthers*, 208 Va. 51, 55, 155 S.E.2d 326, 330 (1967). *See also* Va. Code §§ 15.1-6(1), 15.1-7 (1973); *Board of Supervisors* v. *Alexandria Water Co.*, 204 Va. 434, 438, 132 S.E.2d 440, 442 (1963) ("The Board of Supervisors of Fairfax County is the governing body of the county."). Indeed, Virginia law establishes that the powers of the IDA itself are "legislative powers and their exercise is a legislative function." *IDA* v. *LaFrance Cleaners & Laundry Corp.*, 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975).

perform." *City of Lafayette, La.* v. *Louisiana Power & Light*, 532 F.2d at 435.[17]

From the foregoing it seems clear that if this Court adopts in *Lafayette* the reasoning of the Fifth Circuit and/or the *amicus* position of the Department of Justice, then reversal is mandated here since, as demonstrated, the reasoning of both Judge Widener and Judge Wyzanski is in conflict with that of the Fifth Circuit and the Department of Justice. *A fortiori*, reversal is mandated if the Court should adopt the position of the Ninth Circuit[18] and that of petitioners in *Lafayette*[19] and hold that the anticompetitive activities of municipalities are always exempt under *Parker* v. *Brown*. The decision of the Court of Appeals below thus can be upheld only if this Court holds that under the state-action doctrine, there is no difference between the conduct of municipalities and the conduct of private parties.

B. The Decision of the Court of Appeals Is In Conflict with the Decisions of the Courts of Appeals for the First, Sixth, Seventh and Eighth Circuits.

Prior to *Goldfarb*, it was settled law that operation of public enterprises by a local government or exclusive

[17] The County's goal of an areawide system of health care is also consistent with the priorities set forth in the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300k *et seq.* (Supp. 1975), where Congress established as a national health planning goal "[t]he development of multi-institutional systems for coordination or consolidation of institutional health services." (42 U.S.C. § 300k-2(2) (Supp. 1975)). As the Senate Committee on Labor and Public Welfare stated in its Report on the Act, "[t]he need for strengthened and coordinated planning for personal health services is growing more apparent each day." (S. Rep. No. 93-1285, 93d Cong., 2d Sess. 39 (1974)). *See also* Comprehensive Health Planning and Public Health Services Amendments of 1966, 42 U.S.C. § 246(a)(2)(D), (I) (1970).

[18] *State of New Mexico* v. *American Petrofina, Inc.*, 501 F.2d 363, 370 n.15 (9th Cir. 1974).

[19] Brief for the Petitioners at 13-15.

leasing arrangements between a local government and private concerns were exempt under the state-action doctrine even where such an operation or lease created a local monopoly. *See, e.g., Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Padgett* v. *Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974); *Ladue Local Lines, Inc.* v. *Bi-State Development Agency*, 433 F.2d 131 (8th Cir. 1970); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966). These pre-*Goldfarb* decisions are consistent with the recent state-action decisions of this Court and are directly contrary to the result reached by the Court of Appeals below.

For example, in *Ladue Local Lines, Inc.* v. *Bi-State Development Agency*, 433 F.2d 131 (8th Cir. 1970), Missouri and Illinois both enacted statutes creating a Bi-State Development Authority, a non-profit corporation and body politic, which was authorized by the statutes, "[t]o acquire, by gift, purchase or lease, and to plan, construct, operate and maintain, or lease to others for operation and maintenance . . . passenger transportation facilities." (433 F.2d at 133). Pursuant to this express legislative authorization, the Bi-State Development Authority purchased most of the public service lines in the metropolitan St. Louis area and thereafter instituted a plan providing reduced transportation rates for students. (433 F.2d at 134).

Plaintiff, a private corporation engaged in bus transportation in the area, alleged that the Authority's student pass plan created a monopoly in the transportation of students in violation of Section 2 of the Sherman Act. Relying upon *Parker* v. *Brown*, the Court of Appeals for the Eighth Circuit held that the challenged activities of the Bi-State Development Authority were exempt from suit under the state-action doctrine, even though the

effect of the agency's activities was to create a virtual monopoly in the busing of school children. (433 F.2d at 137).

That the state-action doctrine is equally applicable to actions taken by municipalities pursuant to express legislative enactment of the State is illustrated by the recent decision in *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). In that case Illinois law expressly authorized the City Council of each municipality in the State to "license, franchise and tax" cable television (CATV) systems within the municipality. Under this authority, the City Council of Rockford, Illinois, granted an exclusive CATV franchise to defendant CATV of Rockford, Inc. Plaintiff, which also operated CATV systems, alleged that the City's action in granting a single and exclusive franchise to CATV of Rockford constituted a violation of Sections 1 and 2 of the Sherman Act.

The District Court granted defendants' motion to dismiss the complaint against all defendants. The Court of Appeals for the Seventh Circuit, in an opinion by Judge Tone and concurred in by Mr. Justice Stevens sitting then as circuit judge, affirmed, stating that "[e]ven though the council's actions gave CATV a monopoly of cable television in Rockford and restrained plaintiff from competing in Rockford, those actions did not themselves violate the Sherman Act." (516 F.2d at 228-229).

The facts in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966), are also closely analogous to the facts in the instant case. There, the State of Massachusetts legislatively created the defendant Port Authority, a "body politic and corporate" of the State, for the express purpose of operating and managing Logan Airport, with power to promulgate rules and regulations. The Port Authority determined that only one firm should be per-

mitted to provide facilities, fuel, equipment, supplies and services at Logan Airport and selected Butler Aviation-Boston, Inc. ("Butler-Boston"), a so-called "fixed-base operator," to provide these services. Plaintiff, another fixed-base operator, brought suit against both the Port Authority and Butler-Boston, alleging that the exclusive lease violated Sections 1 and 2 of the Sherman Act.

The District Court dismissed the suit against both the Port Authority and Butler-Boston under the state-action doctrine of *Parker* v. *Brown*. In affirming, the Court of Appeals for the First Circuit ruled that in making the challenged lease the Port Authority was "acting as an instrumentality or agency of the State, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use." (362 F.2d at 55). Holding that "the antitrust laws are aimed at *private* action, not governmental action," the court concluded that the lease between Butler-Boston and the Port Authority did not violate the Sherman Act. (362 F.2d at 55-56; emphasis the court's).

In *Padgett* v. *Louisville & Jefferson County Air Board*, 492 F.2d 1258 (6th Cir. 1974), plaintiffs, independent taxicab drivers, brought suit against the Louisville and Jefferson County Air Board and four other defendants, alleging that the Board had violated the Sherman Act in awarding an exclusive contract to a competing taxicab company for the stationing of cabs at the airport operated by the Board. The District Court dismissed the suit under *Parker* v. *Brown*. In affirming, the Court of Appeals for the Sixth Circuit noted that the "quasi-governmental" Air Board (492 F.2d at 1259) was a legislatively created instrumentality of the State charged with operating the airport. The court concluded that even though the exclusive arrangement resulted in a monopoly of taxicab services, "the Board in contracting for cab service at the airport was exercising a valid governmental function to

which the antitrust laws do not apply." (492 F.2d at 1260).

Although these cases arose prior to this Court's decision in *Goldfarb*, nothing in *Goldfarb* and *Cantor* suggests a contrary result. As noted, in both *Goldfarb* and *Cantor* the alleged anticompetitive conduct was by private parties, not local public agencies. Indeed, *Parker* and *Bates* suggest that *Ladue*, *Metro Cable*, *Wiggins* and *Padgett* were correctly decided. As in *Bates* and *Parker*, in each of these cases the actions of a public body were authorized under a legislative framework pursuant to a definite policy interest of the State.

The analysis applied in these cases is also consistent with the reasoning adopted by the Third, Fifth and Seventh Circuits in *Duke & Co.*, *Lafayette* and *Kurek*. *See Kurek v. Pleasure Driveway & Park District of Peoria*, 557 F.2d at 590-91, nn.7,8. As the Department of Justice states in its *amicus* brief filed in *Lafayette*, "[a] municipality that implements a regulatory measure authorized by the State as part of the governmental power delegated by the State does not violate the antitrust laws." (*Amicus* Brief at 9).

Ladue, *Metro Cable*, *Wiggins* and *Padgett* reflect the reasoning adopted by this Court in *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905); and *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), where the Court held that, under the common law, an exclusive leasing arrangement of publicly imbued property is not contrary to public policy even though such exclusive dealing resulted in the creation of a local monopoly.

In *Donovan*, at issue was the legality of a contract between the Pennsylvania Company and Parmelee Transfer Company which gave Parmelee the exclusive right to furnish carriage and cab services to passengers arriv-

ing at the Pennsylvania Company's railroad station in Chicago. Petitioners, competitors of Parmelee, contended that the Pennsylvania Company could not exclude them from its station, which the Court characterized as private property "devoted primarily to public objects." (199 U.S. at 294). This Court upheld the exclusive leasing arrangement, ruling that while the arrangement created a monopoly in Parmelee to the detriment of its competitors, the "arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve improper use by the railroad company of its property." (199 U.S. at 297).

In *Black and White Taxicab*, plaintiff, Brown and Yellow Taxicab brought suit in federal district court in Kentucky against its competitor, Black and White Taxicab, and the railroad to prevent defendants from interfering with the exclusive leasing arrangement Brown and Yellow had with the railroad. Under this arrangement, Brown and Yellow had the exclusive right to solicit baggage and passengers in and around the railroad depot. Brown and Yellow alleged that the railroad had breached this contract by allowing Black and White and others to solicit. Black and White's defense was that under the Kentucky law the contract was invalid because "the grant of such privileges prevents competition . . . and constitutes such a preference over other transfer men as to give grantee a practical monopoly of the business." (276 U.S. at 526). Relying on *Donovan*, this Court upheld the contract stating that under "general law" (276 U.S. at 527), "[i]t would be unwarranted and arbitrary to assume that this contract is contrary to public interest." (276 U.S. at 529).

These cases are directly applicable to this case. In their complaint, plaintiffs contend that the leasing of Commonwealth to FHA is violative of the Sherman Act because such leasing would eliminate competition be-

tween Fairfax Hospital and Commonwealth. There is no material difference between Fairfax County establishing a "monopoly" of County-owned hospitals run by FHA on the County's behalf and the governmental actions upheld by the Courts of Appeals under the state-action doctrine in *Ladue*, *Metro Cable*, *Wiggins* and *Padgett* and by this Court under the common law in *Donovan* and *Black and White Taxicab*. Indeed, application of the state-action doctrine to the facts of this case is especially appropriate in that the leasing is justified as "a response to health or safety concerns." *Bates* v. *State Bar of Arizona*, 97 S.Ct. at 2697.[20]

In sum, this case presents a classic situation of where the health and welfare of a community would be best served by applying *Parker* v. *Brown*. The District Court below found that since the establishment of FHA in 1955 "the County Board of Supervisors has sought to create a county-wide system of public health services." (App. 34a). Pursuant to this objective the County government determined that the health, welfare and safety of the community would be best served by the leasing of the County-owned Commonwealth to FHA for operation by FHA as part of this multi-hospital health care system. Defendants have not and do not contend that the Fairfax County Board of Supervisors was "commanded" by the Virginia legislature to make this determination. Rather, defendants contend that the County's decision to lease Commonwealth to FHA was well within the express powers which the Virginia legislature delegated by statute to the County to provide adequate hospital and health care facilities for the citizens of Virginia and Fairfax County. Defendants submit that Congress did not intend that the legitimate exercise of such delegated powers by a local government should be subject to antitrust attack.

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[20] *See also Cantor* v. *Detroit Edison Co.*, 428 U.S. at 611 (Blackmun, J., concurring); App. 19a-20a (Hall, J., dissenting).

CONCLUSION

For all the foregoing reasons, the question presented to the Court by this Petition is of such a special and important nature to warrant the issuance of a writ of *certiorari*.

Respectfully submitted,

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December 9, 1977

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1775

CITY OF FAIRFAX, *et al.*,
Appellants,

v.

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Appellees.

Argued January 12, 1977 Decided August 22, 1977

Before WIDENER, Circuit Judge, HALL, Circuit Judge, and WYZANSKI, Senior District Judge.*

Henry St. John Fitzgerald (Tolbert, Smith, Fitzgerald & Ramsey), Nolan E. Clark (Kirkland, Ellis & Rowe), and John Rust, Jr., City Attorney, for Appellants; Paula Jameson, Fairfax County Attorney's Office, Attorney for Defendant Industrial Development Authority of Fairfax County, Virginia, Ray S. Bolze, Kenneth E. Krosin, and Mark W. Pennak (Howrey & Simon), William C. Bauknight (McCandlish, Lillard, Bauknight, Church & Best), Attorneys for Defendants Fairfax Hospital Association, Commonwealth Doctors Hospital, Inc., for Appellees.

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* Sitting by designation.

WYZANSKI, Senior District Judge:

Eight plaintiffs—the City of Fairfax, Virginia, six physicians, and one oral surgeon—appeal from a summary judgment for three defendants—Fairfax Hospital Association (FHA), a private, nonprofit corporation operating Fairfax Hospital, Commonwealth Doctors Hospital, Inc. (CDH), a private corporation operated for profit, and the Industrial Development Authority of the County of Fairfax, Virginia (IDA).

The complaint alleged violations by defendants of Sections 1, 2, and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, and 3), as well as a violation of Virginia state law said to be within the District Court's pendent jurisdiction. Plaintiffs prayed for an injunction pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26), but not for damages.

The substance of the claim was that there were in Fairfax County, Virginia only two hospitals—one operated by FHA, the other by CDH,—and that, by an impending lease of the facilities of CDH to be made by an agency of the Commonwealth of Virginia, IDA, the defendants would be engaging in federal restraints of trade, monopolization, and contracts in restraint of trade.

Defendants' answer raised three principal issues: whether there was such an effect on interstate commerce as to bring the complaint within the coverage of the Sherman Act; whether plaintiffs had standing to complain of defendants' alleged violations of that act; and whether defendants came within the "state action" exemption from the antitrust statutes.

Following pre-trial discovery, each of the parties moved for summary judgment on the three aforesaid issues. In their arguments all parties took the position that *only* the issues of standing and of state action were ripe for summary judgment. However, the District Judge in colloquies with counsel drew attention to the interstate commerce issue, on the ground that "the Court has the duty to raise it itself, because that goes to the issue of jurisdiction."

Then the District Judge found that interstate commerce was not sufficiently involved, and granted defendants' motion for summary judgment on that ground, as well as on the grounds that plaintiffs lacked standing and that defendants were immunized by the doctrine of state action.

The facts so far revealed by pre-trial discovery may be briefly summarized.

The Commonwealth of Virginia administers the affairs of Fairfax County through the Fairfax Board of Supervisors. That Board in 1947 established as a public body a Health Center Commission as authorized by the 1946 "Hospital and Health Center Commission Act", codified at Va. Code Ann. §§ 32-276, *et seq*, as amended (1976 Cum. Supp.). In 1955 that Commission fostered the creation of Fairfax Hospital Association, a private non-profit corporation, which still exists, and is an organization of private individuals who pay $5 each to become members.

FHA has operated for two decades Fairfax Hospital, which now has 600 beds. The hospital facilities and the land on which they stand are leased to FHA by Fairfax County. The lease requires FHA to advise the county of its actions, submit before its adoption its budget to the county, and also to submit for comment important contracts before their execution; but, so far as now appears, the county has not a veto power, an amendment power, or any other coercive power of control. The lease provides that at its expiration the facilities become, and the land remains, the absolute property of the county.

The only acute care facility in Fairfax County other than FHA's is operated by CDH, another hospital, founded in 1967, with 160 beds of which 131 are in use.

Both FHA and CDH buy from outside Virginia over 75% of their drugs and other supplies, amounting to approximately $10,000,000 annually. Both hospitals derive approximately 60% of their gross revenues, or about $24,000,000 from Group Hospitalization, Inc. in the District of Columbia, Medicare, and Medicaid, and an additional $7,500,000 from insurance carriers outside Virginia.

In September 1974 FHA entered into an agreement of intent to purchase all of the CDH assets. Before the agreement no federal, state, or county governmental agency was formally notified, or asked to take any action; and none did act.

After the agreement of intent the parties approached the Fairfax County Board of Supervisors to assist in the take-over. The Board's personnel recommended the use of an industrial development authority (IDA) to be created by the Board pursuant to the Virginia Industrial Development and Revenue Bond Act, codified at Va. Code Ann. §§ 15.1-1373-1399, as amended (1976 Cum. Supp.). They contemplated that such an IDA could purchase CDH and lease it to FHA, and that IDA could raise funds by issuing tax-exempt bonds, thus saving, over the term of the bonds, about $6,000,000 of the sums which otherwise would be required to meet the costs of conventional financing if FHA were to have been the purchaser of CDH and to have raised the funds by going directly to the financial markets.

Pursuant to that recommendation, the Board created an IDA, and, by an ordinance on October 28, 1974, authorized and directed it to buy the facilities of CDH and lease them to FHA. On September 8, 1975 the Board approved the lease by IDA of the CDH facilities to FHA.

This led plaintiffs to file this civil antitrust action. In each of the only three counts of the complaint which are relevant to the present appeal the pleading is directed to the leasing of CDH by IDA to FHA. It is alleged that that leasing, according to count I, will eliminate competition between CDH and FHA, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, according to count II, will monopolize interstate commerce, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and, according to count III, will constitute a contract in restraint of trade, in violation of Section 3 of the Sherman Act, 15 U.S.C. § 3.

In the District Court plaintiffs sought, but were denied, a preliminary injunction prohibiting IDA from acquiring and leasing to FHA CDH's assets, and barring IDA from issuing bonds to raise the funds to pay for the acquisition.

There followed pre-trial discovery and, thereafter, the already-described motions for summary judgment and judgment for defendants. Plaintiffs appealed to this Court.

Our sole appellate function is to decide whether the District Court properly entered a summary judgment upon the abbreviated record consequent upon the discovery. We shall not intimate what would be an appropriate judgment following a full trial.

With respect to the issue whether interstate commerce was sufficiently involved to give the District Court jurisdiction under the antitrust acts, the District Judge was probably misled by our decision in *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 511 F. 2d 678 (CA 4, 1975), which has subsequently been reversed, *Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (May 24, 1976). The Supreme Court's ruling in that case makes it evident that it was an error for the District Judge

summarily to adjudge on the basis of the evidence then before it that there was not a sufficiently substantial effect on interstate commerce to give the court jurisdiction under the Sherman Act. Without anticipating what may be shown at a plenary trial, we merely note that the present record shows that sources outside Virginia furnished both of the hospitals here involved with such substantial supplies and revenues as to indicate that the cited Supreme Court case seems to govern.

Nor can we sustain the District Court's summary judgment on the alternative ground that the record shows that at a plenary trial plaintiffs will not be able to prove that they have a standing to complain of defendants' alleged violation of the antitrust laws.

Section 16 of the Clayton Act, as amended, 15 U.S.C. § 26, provides that "any person" is entitled to an injunction on general equitable principles "against threatened loss or damage by a violation of the antitrust laws."

We do not need at this stage to consider what facts will finally be proved as to the effect that the lease by IDA of CDH facilities to FHA will have upon physicians practicing in Fairfax County, and upon the City of Fairfax which purports to speak for its inhabitants and which may pay directly or by reimbursement hospital bills. It is enough for us to say that we do not find that plaintiffs' claims as to the adverse effects upon their direct pecuniary interests are so remote, speculative, and conjectural as to permit them to be disposed of by summary judgment. There must be opportunity to present full evidence as to whether there are adverse economic effects upon patients, doctors, and the city when, instead of having a choice between two local hospitals, the sick and their physicians are remitted to a Hobson's choice. We leave the matter for further exploration at a plenary trial.

Next we consider defendants' contention that they are immunized by the "state action" exemption to the antitrust laws.

Parker v. *Brown*, 317 U.S. 341 (1943) was the first Supreme Court case to hold that Congress did not intend the Sherman Act to apply to "state action". But, as subsequent cases, such as *Goldfarb* v. *Virginia State Bar*, 421 U.S 733, (1975), and *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110, (1976), have taught us, the exemption judicially created by *Parker* v. *Brown* has a very limited application. The Supreme Court's most recent case, *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (1976), decided that a regulated utility could be found liable under the antitrust laws for tying the sale of its electricity and its light bulbs pursuant to the provisions of a tariff approved by state officials. Five of the Justices held that private conduct was not exempted unless, *at least*, it was shown either that the state *coercively* commanded the private conduct, or that the state in the strictest sense of the term "*regulated*" the private conduct.—(This is not, of course, to say that such a showing is always by itself enough to qualify for the exemption. See Note on the decisions of *The Supreme Court, 1975 Term*, 50 Harv. L. Rev., p. 58 *et seq*, particularly subsection III A p. 229 *et seq.*, covering Antitrust Law, and more specifically pp. 231-232. As that note points out, some of the Justices indicated that *Parker* v. *Brown* requires much more to bring the exemption into play. *Ibid.*, pp. 232-233.)

We do not find it advantageous at this state of this case to set forth this intermediate appellate court's view of the present scope of the "state action" exemption. It will suffice to say that the facts so far developed at bar (which have been summarized in our statement of the case) do not prove that the Commonwealth of Virginia *compelled* FHA to do anything, or that it in the strictest

sense *regulated* the hospital. Without pausing, at this preliminary stage of the litigation, to set forth *in extenso*, the documentary and other evidence so far submitted, we first note that we are not now persuaded that with respect to FHA the roles of the State and its agencies went beyond those of a landlord, of an indirect financier, and of a public authority to which information as to budgets, proposed contracts, and other data had to be submitted. If it turns out that there is nothing else in the form of "state action", the Commonwealth of Virginia has not commanded FHA to lease CDH from IDA, nor has the Commonwealth regulated FHA in such a way as to make applicable *Parker* v. *Brown* as interpreted by *Cantor* v. *Detroit Edison Co.*

But even if FHA does not enjoy a "state action" exemption from the antitrust laws, IDA contends that at least it, as a state agency, enjoys such an exemption. Much stress is laid on this contention, in the light of the complaint which, in each of the three counts under review, directs its fire at the act of IDA in leasing the CDH assets to FHA.

IDA particularly relies upon the Fairfax County Board of Supervisors' action in enacting, on October 28, 1974, an ordinance creating IDA for the specific purposes of raising funds to acquire the CDH assets, and leasing CDH to FHA for operation for the county. The ordinance stated, *inter alia*, that:

> "The Authority [IDA] is hereby authorized and directed to lease Commonwealth Doctors Hospital [CDH] to the Fairfax Hospital Association [FHA] on such terms and conditions as are mutually acceptable to the Authority, the Board of Supervisors and the Association."

While, no doubt, IDA received a command, that command did not come from the legislature of Virginia. As

we understand the prevailing opinion in *Cantor* v. *Detroit Edison Co.*, a command from any lesser state body does not automatically satisfy the conditions precedent for invocation of the "state action" doctrine. The *mere* fact that a body is "a state agency for some limited purposes" does not make it an "antitrust shield that allows it to foster anticompetitive practices." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 733, 791 (1975).

Far more important is the dominant fact that in the case at bar the evidence now before us does not warrant us in treating the particular October 28, 1974 ordinance of the Fairfax County Board of Supervisors as analogous to a legislative coercive command nor to a legislative regulation of private conduct. In context, the ordinance is merely a firm direction from the Board to its creature, IDA.

Such a direction within the executive branch of a state government does not create a basis for concluding that the state as such has compelled action which would otherwise be a violation of federal law. A Congressional Act may be interpreted to avoid conflicts with state legislatures but it would be anomalous to interpret a Congressional Act to avoid conflicts with county commissioners.

Finally, defendants, in support of the judgment below, present an issue not covered in its opinion by the District Court: whether, aside from state action immunity, the lease of CDH by IDA is such an exclusive agreement involving publicly owned or imbued property as not to fall within the federal antitrust laws.

We see nothing in this contention but a re-formulation of one aspect of the claimed exemption under the doctrine of "state action". The facts so far developed preclude the contention for the very same reasons that they preclude other aspects of the doctrine. Up to now it has not been proven that the Commonwealth of Virginia coerced or, in

the usual meaning of the term, regulated the conduct of FHA. The facts of the case as they now stand hardly differ from a case where a state buys from one private corporation property and leases it to another corporation which thereby monopolizes the market by controlling 100% of it.

Out of abundance of caution, we conclude by emphasizing that until there is a full record we do not express or imply any view on the ultimate merits of this case. It may be that when all the facts have been laid before the court it will appear that the Commonwealth of Virginia through Fairfax County is actually exercising complete control over the Fairfax County Hospital, and that every significant aspect of that hospital is operated as a state agency,—the Fairfax Hospital Association being nothing more than a citizens' advisory committee which is required to follow, and is following, specific orders, and is turning over to the state any profits, if there are such. Under such circumstances it might be that the federal antitrust laws no more apply to the hospital than to any department of the government of the Commonwealth of Virginia. Nor do we know of any federal antitrust law that precludes a state from purchasing facilities in order to establish, state-wide or county-wide, a wholly public system of hospital care, even if that results in a monopoly. Such a situation would differ *toto coelo* from the use of state credit or leases to enable a wholly private hospital to acquire a monopoly. Until there has been a plenary trial we cannot know which, if either, of these hypotheses has application to this case.

Judgment for defendants reversed, with costs; further proceedings to be in accordance with this opinion.

WIDENER, Circuit Judge, concurring in the result:

The district court entered summary judgment in favor of the defendants on three independent grounds—lack of a sufficient nexus with interstate commerce to confer jurisdiction under the antitrust laws, absence of standing of the plaintiffs to prosecute this action, and the existence of state action immunity from antitrust scrutiny. I join in Judge Wyzanski's opinion reversing the court below on its first two grounds of judgment.

With respect to the question of state action immunity, I join in remanding the case to the district court for further consideration in light of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), decided subsequent to the granting of summary judgment below. Although, unlike Judge Wyzanski, I am not convinced that local governmental units cannot enjoy antitrust immunity, or that the compulsion of their laws cannot in appropriate instances confer it upon private defendants, I do agree that the proper application of *Cantor* calls for the development of a fuller factual record in the district court. I emphasize that upon remand a factual development must be had which relates not only to the question of the extent of involvement of the Commonwealth, through her laws or agencies, but also to the question of the involvement of local government, whether it be the county as such, or any of its agencies or controlled or authorized authorities.

I.

The significance of the opinion of the Court in *Cantor* lies in its limitation of the opinion in *Parker* v. *Brown*, 317 U.S. 341 (1943), as controlling only in cases in which anticompetitive conduct is engaged in by public officials acting pursuant to State law, or by the State itself. "The only Sherman Act issue decided [in *Parker*] was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions. Since the case now before us

does not call into question the legality of any act of the State of Michigan or any of its officials or agents, it is not controlled by the *Parker* decision." 428 U.S. at 591-92.

If the immunity bestowed by *Parker* applied only to the State itself and to those State officials who adopted and enforced California's agricultural proration program, unresolved was the status with respect to the antitrust laws of those private individuals who were subject to the challenged regulations. The plurality opinion in *Cantor* thus faced the other side of the *Parker* coin, the extent to which private persons who engage in anticompetitive practices that are permitted or even required by State law are subject to Sherman Act proscriptions.

The clear import of the Court's holding (and this is a majority) is that State approval of private conduct, even to the extent of formally requiring its continuation in certain circumstances, is insufficient by itself to confer immunity from antitrust liability. 428 U.S. at 592-98. In *Parker's* words, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351. Read in light of *Cantor*, it thus appears that the "threshold inquiry" delineated in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), "whether the activity is required by the State acting as a Sovereign," 421 U.S. at 790, expresses no more than a necessary, though not necessarily sufficient, condition to a finding of immunity in the sphere of private conduct. The threshold defined in *Goldfarb* was not crossed in that case, thus ending the immunity analysis ("We need not inquire further into the State-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." 421 U.S. 790); it was crossed in *Cantor*, where tariffs carrying the force of State law required the

continuation of the challenged light bulb exchange program until further action of the State. Further inquiries were therefore necessary.

First, it was recognized that considerations of fairness could prevent the imposition of Sherman Act liability upon a person who was merely complying with State law. At the same time, however, the notion that antitrust liability must inevitably be deemed unjust in this context was specifically disclaimed. If the existence of the State compulsion resulted from a process of joint decisionmaking between the State and the defendant, i.e. if the defendant initiated the anticompetitive conduct and later obtained State approval, or if he otherwise engaged in violation as much out of his own choice as State compulsion, there would be no unfairness in not immunizing him, even from treble damage liability. Indeed, this was found to be the case in *Cantor*, where the light bulb program, as characterized in a later Supreme Court pronouncement, "was instigated by the utility with only the acquiescence of the State regulatory commission." *Bates* v. *State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977).

The resolution of this unfairness analysis necessitates a factual inquiry in each case. As is apparent here, however, sufficient findings have yet to be made. Quite significant are whether the defendants are indeed acting under legal compulsion (other than IDA, which appears from the record) and, if so, whether the compulsion is any other than of the defendants' own design, with the role of the State or County being essentially quiescent. *Cantor* rejects immunity on the ground of unfairness where legal obligations inconsistent with the Sherman Act arose to a sufficient extent from a process of shared decisionmaking between State authorities and private defendants. Here, it seems that Fairfax Hospital Association and Commonwealth Doctor's Hospital could have had guiding roles in this sale-lease transaction. I am

not at all satisfied at this stage that the unfairness analysis suggested in *Cantor* (and rejected on the facts of that case) is supported by the record in this case as it now stands.

Secondly, even apart from considerations of fairness, an implied exemption from the antitrust laws may be found to the extent necessary to preserve existing State regulatory schemes that are demonstrated to serve strong, clearly articulated regulatory interests. No such interest was found in *Cantor*, where the State's policy toward the distribution of light bulbs was inferred to be neutral, and where the fate of the challenged exchange program would leave "almost entirely unimpaired" Michigan's interest in regulating the distribution of electricity. To be contrasted is the State of Arizona's interest in regulating the practice of law, recently examined in *Bates* v. *State Bar of Arizona*, supra. "[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." 45 U.S.L.W. at 4898.

Examining the state of the record in the present case, it is again apparent that further factual findings by the district court are necessary to a determination of the implied exemption question. Along with Judge Hall and Mr. Justice Blackmun, I do not question the considerable interest a State may have in regulating matters of health and safety, an interest that may well encompass a desire to achieve hospital ownership, or control, or both. But for the purpose of implying an exemption from the federal antitrust laws, of central importance is not whether the area of regulation is one in which the State could assert a strong regulatory interest, but whether it has in fact done so, and more specifically, whether the allegedly anticompetitive activity is part of an existing program of regulation that could be disrupted by the superimposition of antitrust standards. The evil sought to be avoided is the unnecessary disruption of existing

State regulatory schemes. See *Cantor*, supra, 428 U.S. at 595-98. Thus, in *Bates*, supra, the attorney advertising case, the Court made reference not only to the significant interest of the State in regulating the legal profession, but that, "[m]ore specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight." 45 U.S.L.W. at 4898.

There is not sufficient indication in the record as presently constituted here, however, that the contemplated sale-lease transaction involved here is necessarily related to any existing regulatory interest in hospital ownership on the part of the State of Virginia or Fairfax County. Evidence to the contrary may appear if it is the fact that the transaction originated in an agreement between two private corporations, FHA and CDH. It is not enough to avail these private defendants of an absolute defense that the County's mere participation in their activity was within the scope of the powers conferred upon it by the State legislature. Nor is it sufficient that the County has asserted a general regulatory interest in hospital facilities valid under State law. An essential inquiry the district court must make is whether this particular challenged transaction is part of an existing, public regulatory program that stands to be frustrated by the application of the antitrust laws. Only then may such an exemption be implied, to the minimum extent necessary to make the regulation work. *Cantor*, supra, 428 U.S. at 597.

II.

Of considerable importance to the ultimate resolution of the immunity issue in this case is the question of whether local governmental units may be shielded by *Parker*-type immunity for state action, and whether the same analyses articulated in *Cantor* apply with equal force to those private defendants who act in accordance with local laws regulating economic activity. Lacking the

benefit of the district court's consideration of this issue in light of the most recent Supreme Court decisions on state action immunity, as well as of a complete factual record in this case, I would set out only in the most general terms a guideline for the district court to use in its reconsideration in this case.

I think the case of *City of Lafayette La.* v. *La. Power & Light Co.*, 532 F2d 431 (5th Cir. 1976), cert. granted, 45 L.W. 3647 (March 28, 1977), states approximately the correct rule. That case holds that the mere fact that the actions of a city are involved does not automatically place such actions outside the scope of the federal anti-trust laws, but adds that if the challenged activity were within the authority given a governmental entity to operate in a particular area, then the activity should be exempt. I would add to the rule of *City of Lafayette* that in addition to the prerequisites stated in that case the activity involved must meet one of the analyses set forth in *Cantor*.

I thus do not agree with Judge Wyzanski's apparent conclusion that a local governmental body must as a matter of fact be acting at the compulsion of the State, almost its alter-ego, in order to qualify for a *Parker* exemption. Rather, I think the activities of a governmental entity, State or local, may qualify for a *Parker* exemption if they meet one of the analyses of *Cantor*. My principal disagreement with Judge Hall is that I do not think the record in this case presently supports a finding that the parties were acting pursuant to legislative command.

I further agree with Judge Hall and feel that the fact that the actions taken by the defendants in this case involve the health of the community should be given special weight in determining whether, under any of the analyses of *Cantor*, an exemption from the federal antitrust laws should apply.

HALL, Circuit Judge, concurring and dissenting:

I concur with the majority holding that upon the record in this case there is sufficient interstate commerce involved to confer jurisdiction upon the district court to permit the case to proceed to trial. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U.S. 738, 743-745 (1976), decided after the district court rendered its opinion compels this result.

I also concur with the majority holding that upon the record in this case the plaintiffs, the City, and the individual physicians have alleged sufficient pecuniary injuries to confer standing to sue and proceed to trial.

I respectfully dissent, however, as to the ruling regarding the state action exemption to the antitrust laws and would affirm the district court ruling granting summary judgment to the defendants on that basis.

First. The district court and the parties agreed that the record in this case at the time the motions for summary judgment were considered as adequate for a decision as to whether or not the IDA-FHA-CDH acquisition was exempt under the "state action" exemption to the antitrust laws set forth in *Parker* v. *Brown*, 317 U.S. 341 (1943). I agree with the district court that the record is sufficient to decide that issue at this time and, therefore, I see no need to postpone a ruling meeting this issue pending a trial on the merits.

Second. I also dissent from that portion of the majority opinion regarding the "state action" exemption that does base its decision on the record as it is presently constituted, but nevertheless seeks to apply the standards set by the Supreme Court in the "state action" exemption cases in *Parker*, *supra*, *Goldfarb*, *supra*, and *Cantor*, *supra*, resulting in what is essentially advisory dicta regarding this court's view of the "state action" exemption. If a reversal is in order, since *Cantor* v. *Detroit*

Edison Co., —— U.S. ——, 96 S. Ct. 3110 (1976), and *Bates* v. *State Bar of Arizona*, —— U.S. ——, 97 S. Ct. 2691 (1977), were decided after the district court rendered its memorandum opinion and order, I would permit the district court to apply *Cantor* and *Bates* for itself in the first instance rather than have this court render what is essentially an advisory opinion.

Third. I disagree with the substance of the majority opinion which, to me, subject to possible correction,[1] interprets the scope of the "state action" exemption to the antitrust laws much too narrowly upon the facts in this case. I would affirm the district court's ruling granting the defendants' motion for summary judgment on state action exemption grounds for the reasons succinctly stated by the district court in its opinion below. *See City of Fairfax, Va.* v. *Fairfax Hospital Association*, [1976—2] *CCH TRADE CASES* ¶ 60,999, at pp. 69,424 to 69,425 (No. 75-866A, May 3, 1976).

Lest there be any misunderstanding of the rule I would adopt in this case, I would *not* broadly hold that the mere participation by a governmental entity less than the state *per se* confers a "state action" exemption to the antitrust laws. What I *would* hold is that, although there was indeed a "blend of private and public decision making" in the facts of this case, the conduct of all the parties acting pursuant to legislative command as set forth in the district court opinion sufficiently deprived the private parties of their "freedom of choice to act" rendering it "unfair" not to exempt the defendants from the reach of antitrust laws. *Cantor*, *supra*, 96 S. Ct. at 3118, 3119. Other courts, in *pre Cantor* decisions,

[1] At least one case presently pending before the Supreme Court could markedly alter this dissent. In *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3647 (1977), the "state action" exemption to the antitrust laws as related to conduct of municipalities appears to be squarely before the court.

contra the majority have held somewhat similar type transactions exempt. *See Ladue Local Lines, Inc.* v. *Bi-State Development Agency of the Missouri-Illinois Metropolitan District*, 433 F.2d 131 (8th Cir. 1970) (passenger transportation facilities); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 375 F. Supp. 350 (N.D. Ill. 1974), *aff'd*, 516 F.2d 220 (7th Cir. 1975) (municipality and exclusive cable T.V. franchise); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966) (Port Authority created pursuant to legislative mandate to operate Boston's Logan International Airport). *See also Murdock* v. *City of Jacksonville, Florida*, 361 F. Supp. 1083 (M.D. Fla. 1973) (exclusive lease to private party by City of coliseum for wrestling matches—if not "state action," then leasing was "official action directed by a state" under *Parker* v. *Brown*).

Finally, it should be noted that this case does not deal with regulation of agricultural competition in the private sector of the economy, as in *Parker* v. *Brown*, *supra*. Nor does this case concern antitrust regulation or exemption of the professions or their first amendment rights as in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Bates* v. *State Bar of Arizona*, —— U.S. ——, 97 S. Ct. 2691 (1977). Nor does it involve an antitrust exemption assertedly arising out of private unregulated conduct which was a corollary to pervasively state-regulated conduct as occurred in the light-bulb exchange program assailed in *Cantor* v. *Detroit Edison Co.*, *supra*.

Instead, I believe this case presents the issue left open by Justice Blackmun concurring in *Cantor* v. *Detroit Edison Co.*, *supra*, 96 S. Ct. at 3126 and 3128, and clarified by him in *Bates* v. *State Bar of Arizona*, *supra*, —— U.S. ——, 97 S. Ct. 2691. In *Cantor*, Justice Blackmun noted that considerations of "health or safety" would

at least weigh "forcefully" in his application of a "rule of reason" analysis in state action cases. In *Bates*, speaking for the entire Court, Justice Blackmun placed *Cantor* in context by noting that in that case "[t]here was no suggestion that the [light] bulb program was justified by flaws in the competitive market or was a response to health or safety concerns." 97 S. Ct. 2691, 2697. *See also City of Fairfax* v. *Fairfax Hospital Association*, [1976—2] *CCH TRADE CASES* ¶ 60,999 at pp. 69,424 to 69,425; *Lowenstein* v. *Evans*, 69 F. 908 (Cir. Ct. S.C. 1895), at 911; *Note: The Supreme Court, 1975 Term*, 90 Harv. Law Rev. 56, 237 (1976).

I therefore believe the district court correctly entered summary judgment for the defendants in this case on the state action exemption grounds, would determine that issue on this record at this time, and would affirm.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1775

CITY OF FAIRFAX, VIRGINIA, RUBEN D. CABRERA, M.D., ALBERT C. CASABONA, M.D., WILLIAM J. GAZALE, M.D., RAFAEL F. MADAN, DDS, WILLIAM E. ROLL, JR., M.D., GEORGE A. WHIPPLE, M.D., HARMEN VAN DER WOUDE, M.D.,

Appellants,

versus

FAIRFAX HOSPITAL ASSOCIATION, COMMONWEALTH DOCTORS HOSPITAL, INC., INDUSTRIAL DEVELOPMENT AUTHORITY OF FAIRFAX COUNTY, VIRGINIA,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Richard B. Kellam, District Judge

Upon motion of the appellees', by counsel and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees' in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed within the time permitted by the Federal Rules of Appellate Procedure.

For the Court—by Direction

/s/ William K. Slate, II
Clerk

[Filed November 17, 1977]

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Re: No. 76-1775—CITY OF FAIRFAX, *et al.* v.
FAIRFAX HOSPITAL ASSOCIATION, *et al.*

ORDER

Upon the appellees' suggestion for rehearing en banc and the request by a judge for a poll of the court on the question of whether or not the case should be reheard en banc, less than a majority have voted that the case be reheard en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it here is, denied.

With the concurrence of Judge Widener.

Judge Hall dissents. He would grant rehearing. He believes the case should be decided in accordance with his separate concurring and dissenting opinion previously filed.

/s/ Charles E. Wyzanski, Jr.
For the Court

[Filed November 2, 1977]

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

September 16, 1977

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Re: 76-1775, City of Fairfax, VA, et al vs.
Fairfax Hospital Association, et al

Dear Counsel:

Enclosed is a certified copy of an order rescinding this Court's order filed September 15, 1977 and denying the petition for rehearing only.

I have been directed by the court to advise counsel for the plaintiffs' to file a brief in opposition to the suggestion for rehearing en banc. The response should be filed on or before September 28, 1977.

Sincerely yours,

WILLIAM K. SLATE, II

By /s/ Carol R. Lemon
(Mr.) CAROL R. LEMON
Chief Deputy Clerk

CRL:ecr

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1775

CITY OF FAIRFAX, VIRGINIA, RUBEN D. CABRERA, M.D., ALBERT C. CASABONA, M.D., WILLIAM J. GAZALE, M.D., RAFAEL F. MADAN, DDS, WILLIAM E. ROLL, JR., M.D., GEORGE A. WHIPPLE, M.D., HARMEN VAN DER WOUDE, M.D.,

Appellants,

versus

FAIRFAX HOSPITAL ASSOCIATION, COMMONWEALTH DOCTORS HOSPITAL, INC., INDUSTRIAL DEVELOPMENT AUTHORITY OF FAIRFAX COUNTY, VIRGINIA,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Richard B. Kellam, District Judge

IT IS ORDERED that this Court's order filed September 15, 1977 is rescinded.

IT IS FURTHER ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wyzanski for a panel consisting of Judge Widener, Judge Hall and Judge Wyzanski.

For the Court,

/s/ William K. Slate, II
Clerk

[Filed September 16, 1977]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1775

CITY OF FAIRFAX, VIRGINIA, RUBEN D. CABRERA, M.D., ALBERT C. CASABONA, M.D., WILLIAM J. GAZALE, M.D., RAFAEL F. MADAN, DDS, WILLIAM E. ROLL, JR., M.D., GEORGE A. WHIPPLE, M.D., HARMEN VAN DER WOUDE, M.D.,

Appellants,

versus

FAIRFAX HOSPITAL ASSOCIATION, COMMONWEALTH DOCTORS HOSPITAL, INC., INDUSTRIAL DEVELOPMENT AUTHORITY OF FAIRFAX COUNTY, VIRGINIA,

Appellees.

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Wyzanski for a panel consisting of Judge Widener, Judge Hall, and Judge Wyzanski.

For the Court,

/s/ William K. Slate, II
Clerk

[Filed September 15, 1977]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 75-866-A

CITY OF FAIRFAX, VIRGINIA, RUBEN D. CABRERA, M.D., ALBERT C. CASABONA, M.D., WILLIAM J. GAZALE, M.D., RAFAEL F. MADAN, D.D.S., WILLIAM E. ROLL, JR., M.D., GEORGE A. WHIPPLE, M.D., and HARMEN VAN DER WOUDE, M.D.,

Plaintiffs,

v.

FAIRFAX HOSPITAL ASSOCIATION, COMMONWEALTH DOCTORS HOSPITAL, INC., and INDUSTRIAL DEVELOPMENT AUTHORITY OF FAIRFAX COUNTY, VIRGINIA,

Defendants.

MEMORANDUM OPINION AND ORDER

The plaintiffs seek to enjoin the defendants from actions which allegedly violate the antitrust laws of the United States, specifically, the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2 and 3. The case is before the Court on cross motions for summary judgment. Each party agrees there are no disputed facts and that the matter is ripe for decision.

BACKGROUND

The Fairfax Hospital Association (FHA) is a nonstock, nonprofit corporation created by the Fairfax County Hospital and Health Center Commission and chartered by the State of Virginia to operate hospitals. Since 1961 the FHA has operated the Fairfax Hospital under a lease agreement with the County of Fairfax. In 1967 the voters of Fairfax County approved a bond referendum providing

funds for the development by the County of a multi-hospital system of health care facilities, all of which were to be operated by the FHA. The current lease agreement between the County and the FHA provides for the lease by the FHA of the Mt. Vernon Hospital, presently under construction, and the proposed ambulatory emergency and health care facility, known as ACCESS, as well as the Fairfax Hospital.

The FHA exists solely to serve the public. Upon termination of the lease agreement all of the assets of the FHA are to be conveyed to the County.

In 1974 the directors of the Commonwealth Doctors Hospital (CDH) notified the FHA that the CDH was for sale and that offers from several national for-profit corporations had been received. The FHA appointed an ad hoc committee to investigate the desirability and feasibility of acquiring the CDH assets. The committee reported to the trustees of the FHA that acquisition of the CDH would further the community interest in high quality and efficient health care by incorporating the CDH facilities into a unified County health care system and would result in lowering the cost of health care in the community. After reviewing the findings of the ad hoc committee the FHA Board of Trustees voted to offer to buy the assets of the CDH. On September 27, 1974 the directors of CDH accepted the FHA offer.

Thereafter County representatives, together with the FHA staff, reviewed financing alternatives and recommended that the County form an industrial development authority (IDA) to issue tax exempt bonds, acquiring the CDH assets for the County and leasing them to the FHA. On October 28, 1974, the Board of Supervisors enacted an emergency ordinance creating an IDA for the purpose of raising funds to acquire the assets of CDH in accordance with the proposals of the County staff. The Board of Supervisors adopted an ordinance on December 9,

1975 creating the IDA. On October 15, 1975 the County Board of Supervisors approved the contract of purchase, the lease agreement, the trust indenture, and authorized issuance of the bonds and acceptance of title to the CDH assets. The parties closed on January 8, 1976, the IDA receiving by assignment the contract between the FHA and CDH and taking title to the CDH assets. The IDA and FHA executed the lease agreement.

The plaintiffs filed this suit December 12, 1975 seeking to enjoin the lease to FHA of the CDH facilities and the issuance of bonds by the IDA for the purpose of acquiring the CDH assets. This Court denied the plaintiffs' application for a preliminary injunction on December 19, 1975.

INJURIES ALLEGED

The individual plaintiffs are physicians who reside in the City of Fairfax and in Fairfax County and practice medicine at either Fairfax Hospital or Commonwealth Doctors Hospital. Several practice at both hospitals. The City of Fairfax is an incorporated city entirely surrounded by the County of Fairfax. The individual plaintiffs allege that they will be injured by the FHA operating all of the hospitals in the County and City of Fairfax in that the lack of competition in the health services area will lead to an increase in the price or decrease in the quality of services provided and that as prospective patients themselves and as consumers of hospital goods and services the plaintiffs will suffer injury thereby.

The City of Fairfax alleges that the transfer of CDH, a taxpaying entity, to the IDA, a nontaxpaying entity, and the operation of the hospital by the FHA, a nontaxpaying entity, will result in the loss of property taxes thereby injuring the City. The City further alleges that as a result of what it considers to be an inevitable increase in the cost of patient care the City will be re-

quired to pay higher hospitalization insurance premiums for its employees.

SHERMAN ACT CLAIMS

Section 16 of the Clayton Act, as amended, 15 U.S.C. § 26, provides for injunctive relief for private parties who are threatened with loss or damage by a violation of the antitrust laws. The plaintiffs allege that the defendants' actions will violate sections one, two and three of the Sherman Act, 15 U.S.C. §§ 1, 2 and 3, which proscribe contracts, combinations, and conspiracies in restraint of trade or commerce among the states, territories, and District of Columbia, and make punishable as a misdemeanor those who monopolize or attempt to monopolize any part of the trade or commerce among the states.

To make out a case for relief under the Sherman Act the plaintiffs must show that the defendants' actions substantially and adversely affect interstate commerce. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195 (1974). Even though the actions themselves may be local in nature, if their effects are upon interstate commerce they are within the reach of the Sherman Act. *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949). The requirement of substantiality, however, acts as a practical barrier to claims which only have a remote or minor effect on interstate commerce in recognition of the fact that in our complex and interdependent society every act could, at least in theory, affect interstate commerce. *Cf. Rasmussen* v. *American Dairy Assn.*, 472 F.2d F.2d 417, 526 (9th Cir. 1973).

All of the injuries alleged herein occur *intra*state. Possible increases in the cost of hospital services or a decrease in the quality of the same are effects entirely intrastate for such services themselves have long been held purely local in nature. *Hospital Building Co.* v. *Trustees of Rex Hospital*, 511 F.2d 678, 682 (4th Cir. 1975);

Elizabeth Hospital, Inc. v. *Richardson*, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic* v. *Cleere*, 197 F.2d 125, 126 (10th Cir. 1952). It is recognized, of course, that under some circumstances the control of hospital services which threatens to eliminate entirely competitive facilities may have an effect upon interstate commerce. *Cf. Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3d Cir. 1973). In *Doctors* the alleged injury to interstate commerce would occur through the elimination of the plaintiff hospital from membership in the defendants' third party payer program. Elimination from such coverage, so the plaintiff alleged, would cause the plaintiff hospital to lose patients and shut down thus cutting out over a quarter million dollars of annual interstate commerce in hospital supplies. The *Doctors* Court found the allegation of an effect upon the flow of interstate supplies sufficient to withstand a motion to dismiss on the grounds of lack of subject matter jurisdiction. In this case there is no threat of the elimination of a competing hospital facility with concurrent loss of interstate business in hospital supplies. On the contrary, the County of Fairfax and the IDA intend to continue to operate CDH, but under the management and control of FHA. The suggestion that at some speculative future date the County may decide to change the nature of services offered at CDH could only remotely affect interstate commerce. Indeed it is likely that with an expansion of health care facilities in the County and City of Fairfax under the County's program there will be an *enhancement*, rather than a restraint, of commerce. Regarding the City's asserted tax loss injury, there can be no doubt that such an effect is entirely local. The possibility that the City may be required at some future date to pay higher health premiums, aside from its purely speculative nature, is an effect which is local in nature, arising as it must from the local cost of health services. Even if proven, the plaintiffs' alleged injuries occur intrastate

and do not substantially affect interstate commerce. *See generally*, Furgeson, *The Commerce Test for Jurisdiction Under the Sherman Act*, 12 Houston L.Rev. 1052 (1975).

To seek injunctive relief under the antitrust laws, a party must satisfy traditional equitable prerequisites. 15 U.S.C. § 26. Traditional principles of equity require the courts to find that allegedly unlawful conduct is likely to cause irreparable harm as a prerequisite to issuing an injunction. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969); *Treasure Valley Potato Bargaining Assn.* v. *ORE-IDA Foods, Inc.*, 497 F.2d 203, 218 (9th Cir. 1974). The plaintiffs claim threatened injuries which are based on pure speculation and conjecture. The record suggests that they will suffer none of the predicted increase in costs. The FHA has historically charged lower fees at the Fairfax Hospital than were charged at the for-profit CDH. Furthermore, many of the individual plaintiffs have had physicians' privileges at both facilities for some time, but there is no evidence or suggestion that the quality of services at the FHA operated hospital has been lower than that of the services at CDH. We have no credible assertion of any likely injury occurring to any of the individual plaintiffs. As previously stated, the City of Fairfax has not established any likelihood that its health premiums will increase. Moreover, the loss of tax revenue does not occur as a result of a violation of the antitrust laws but rather as a result of the tax laws. The City does not object to any and all nonprofit organizations owning or operating the CDH facilities, but only their ownership by the IDA and lease to and operation by FHA. The plaintiffs have failed to establish any right to relief under the federal antitrust laws. Therefore summary judgment shall be entered against both the City and the individual plaintiffs on their claim for relief under the Clayton Act, 15 U.S.C. § 26.

STANDING OF THE PLAINTIFFS

The defendants have questioned the standing of the plaintiffs to bring this action. Only those private litigants who demonstrate that they are threatened by loss or damage as a result of a violation of the antitrust laws may seek injunctive relief. *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954). The damage asserted must flow proximately, not merely accidentally or consequentially, nor remotely, from the defendants' antitrust actions. *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 419 (4th Cir. 1966), *cert. denied*, 385 U.S. 934 (1966) (applying the treble damages provision of the Clayton Act). The remote pocketbook injuries of the plaintiffs herein are insufficient to confer standing under Section 16 of the Clayton Act, 15 U.S.C. § 26. *Cf. Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975). Stated another way, the plaintiffs are not within the target area of the defendants' alleged antitrust violations. *Cf. Long Island Lighting Co.* v. *Standard Oil Co. of Cal.*, 521 F.2d 1269, 1273-74 (2d Cir. 1975).

STATE ACTION IMMUNITY

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Supreme Court observed that the Sherman Act was not intended to restrain state action or official action directed by a state. 317 U.S. at 351. The threshold inquiry is whether the activity is required by the state acting as sovereign. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975). Such an intent may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity. *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975). The plaintiffs here attack the lease by the IDA to the FHA of property belonging to the IDA. The

lease was made at the direction of the Board of Supervisors of the County of Fairfax. Therefore, if the lease is an exercise of the state acting as sovereign it is immune from federal antitrust attack. There can be no doubt that the actions of the IDA are legislative in nature. *Industrial Development Authority* v. *LaFrance Cleaners & Laundry Corp.*, 217 S.E.2d 879, 883, 216 Va. 277 (1975). The State of Virginia has long recognized that private enterprises may not provide adequate hospital and medical care to the public and has authorized cities and counties to form health and hospital authorities and commissions for the purpose of providing adequate public hospital and medical care. Va. Code Ann. §§ 32-212 *et seq.* and 32-276 *et seq.* In creating the Industrial Development and Revenue Bond Act of Virginia, Va. Code Ann. §§ 15.1-1374 *et seq.*, the Legislature specifically empowered industrial development authorities to acquire facilities, including "all medical (including, but not limited to, office and treatment facilities) . . . ." Va. Code Ann. §§ 15.1-1374(d) and 1378. In 1947 the County of Fairfax, pursuant to State mandate, established a Hospital and Health Care Commission. The Commission, in 1955, established the Fairfax Health Authority to operate public health facilities within the County. Since then the County Board of Supervisors has sought to create a county-wide system of public health services. The lease by the IDA to the FHA, therefore, is part of a State mandated program providing for the public health, an act within the police power of the states and clearly an act of sovereignty shielded from antitrust attack. *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 791.

VALIDITY OF THE IDA

The plaintiffs assert that the creation of the IDA was beyond the authority of the Board of Supervisors. The plaintiffs' theory is that the creation of an IDA in

order to receive favorable funding and to acquire the assets of a private corporation which is already located in Virginia and which has no intention of leaving is contrary to the statutory grant of authority. Such a claim is before this Court under the Court's pendent jurisdiction. Whether a federal court should dispose of a state claim within its pendent jurisdiction was thoroughly discussed in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). The federal claim must have sufficient substance to confer subject matter jurisdiction. 383 U.S. at 725. A claim under the Sherman and Clayton Acts, even when later shown to be insufficient to establish an effect upon interstate commerce, may be sufficient to confer subject matter jurisdiction. *Hospital Building Co.* v. *Trustees of Rex Hospital, supra*, 511 F.2d at 680-81. The state and federal claims, moreover, must derive from "a common nucleus of operative fact" such that one would ordinarily be expected to try them all in one judicial proceeding. *United Mine Workers* v. *Gibbs, supra*, 383 U.S. at 725. But whether to entertain a pendent claim which is within the power of the Court to decide is within the discretion of the Court. 383 U.S. 726. *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *Webb* v. *Bladen*, 480 F.2d 306 (4th Cir. 1973). Having disposed of the plaintiffs' federal claims herein, we think this Court should dismiss the pendent state claim, without prejudice, in order to avoid a needless decision of state law by the federal courts both as a matter of comity and to promote justice.

Therefore, it is ORDERED, ADJUDGED, and DECREED that:

1. The defendants' motion for summary judgment on the plaintiffs' federal antitrust claims be, and the same hereby is, GRANTED.

2. The plaintiffs' motion for summary judgment be, and the same hereby is, DENIED.

3. The plaintiffs' state claim asserting invalidity of the IDA be, and the same hereby is, DISMISSED WITHOUT PREJUDICE.

/s/ Richard B. Kellam
United States District Judge

Norfolk, Virginia
May 3rd, 1976.

Sherman Act, 15 U.S.C. §§ 1, 2, 3 (Supp. 1975)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade of commerce in

any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708.

Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 *et seq.* (Supp. 1977)

§ 15.1-1373. Short title.—This chapter shall be known and may be cited as the "Industrial Development and Revenue Bond Act." (1966, c. 651.)

§ 15.1-1374. Definitions.—Wherever used in this chapter, unless a different meaning clearly appears in the context, the following terms, whether used in the singular or plural, shall be given the following respective interpretations:

(a) "*Authority*" shall mean any political subdivision, a body politic and corporate, created, organized and operated pursuant to the provisions of this chapter, or if said authority shall be abolished, the board, body, commission, department or officer succeeding to the principal functions thereof or to whom the powers given by this chapter shall be given by law.

(b) "*Municipality*" shall mean any county or incorporated city or town in the Commonwealth with respect to which an authority may be organized and in which it is contemplated the authority will function.

(c) "*Governing body*" shall mean the board or body in which the general legislative powers of the municipality are vested.

(d) "*Authority facilities*" or "*facilities*" shall mean any or all medical (including, but not limited to, office and treatment facilities), pollution control, industrial facilities and facilities for the residence or care of the aged, and multi-state regional or national headquarters offices or operations centers, located within or without or partly within or without the municipality creating the authority, now existing or hereafter acquired, constructed or installed by or for the authority for lease or sale by the authority pursuant to the terms of this chapter. Any

facility may consist of or include any or all buildings, improvements, additions, extensions, replacements, machinery or equipment, and may also include appurtenances, lands, rights in land, water rights, franchises, furnishings, landscaping, utilities, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto, acquired, constructed, or installed by or on behalf of the authority. A pollution control facility shall include any facility acquired, constructed or installed or any expenditure made, including the reconstruction, modernization or modification of any existing building, improvement, addition, extension, replacement, machinery or equipment, and which is designed to further the control or abatement of land, sewer, water, air, noise or general environmental pollution derived from the operation of any industrial or medical facility. Any facility may be constructed on or installed in or upon lands, structures, rights-of-way, easements, air rights, franchises or other property rights or interests whether owned by the authority or others.

(e) *"Cost"* shall mean and shall include, as applied to authority facilities, the cost of construction, the cost of acquisition of all lands, structures, rights-of-way, franchises, easements and other property rights and interests, the cost of demolishing, removing or relocating any buildings or structures on lands acquired, including the cost of acquiring any lands to which such buildings or structures may be moved or relocated, the cost of all labor, materials, machinery and equipment, financing charges, interest on all bonds prior to and during construction and, if deemed advisable by the authority, for a period not exceeding one year after completion of such construction, cost of engineering, financial and legal services, plans, specifications, studies, surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing the authority facilities, administrative expenses, pro-

visions for working capital, reserves for interest and for extensions, enlargements, additions and improvements, and such other expenses as may be necessary or incident to the construction of the authority facilities, the financing of such construction and the placing of the authority facilities in operation. Any obligation or expense incurred by the Commonwealth or any agency thereof, with the approval of the authority, for studies, surveys, borings, preparation of plans and specifications or other work or materials in connection with the construction of the authority facilities may be regarded as a part of the cost of the authority facilities and may be reimbursed to the Commonwealth or any agency thereof out of the proceeds of the bonds issued for such authority facilities as hereinafter authorized.

(f) *"Bonds"* or *"revenue bonds"* shall embrace notes, bonds and other obligations authorized to be issued by the authority pursuant to the provisions of this chapter.

(g) *"Revenues"* shall mean any or all fees, rates, rentals and receipts collected by, payable to or otherwise derived by the authority from, and all other moneys and income of whatsoever kind or character collected by, payable to or otherwise derived by the authority in connection with the ownership, leasing or sale of the authority facilities.

(h) *"Commonwealth"* shall mean the State of Virginia.

(i) *"Trust indenture"* shall mean any trust agreement or mortgage under which bonds authorized pursuant to this chapter may be secured.

(j) *"Enterprise"* shall mean any industry for the manufacturing, processing, assembling, storing, warehousing, distributing, or selling any products of agriculture, mining, or industry and for research and development or scientific laboratories, including, but not limited to, the practice of medicine and all other activities related there-

to or for such other businesses as will be in the furtherance of the public purposes of this chapter. (1966, c. 651; 1968, c. 687; 1970, c. 725; 1972, c. 783; 1973, c. 528; 1977, cc. 238, 619, 673.)

§ 15.1-1375. Purpose of chapter.—It is the intent of the legislature by the passage of this chapter to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in this Commonwealth and further the use of its agricultural products and natural resources, and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity. It is not intended hereby that any such authority shall itself be authorized to operate any such manufacturing, industrial or commercial enterprise.

It is the further intent of the legislature and shall be the policy of the Commonwealth to grant to industrial development authorities the powers contained herein with respect to pollution control facilities to the end that such authorities may protect and promote the health of the inhabitants of the Commonwealth and the conservation, protection and improvement of its natural resources by exercising such powers for the control or abatement of land, sewer, water, air, noise and general environmental pollution derived from the operation of any industrial or medical facility and to vest such authorities with all powers that may be necessary to enable them to accomplish such purpose, which powers shall be exercised for

the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity.

It is the further intent of the legislature and shall be the policy of the Commonwealth to grant to industrial development authorities the powers contained herein with respect to medical facilities and facilities for the residence or care of the aged to the end that such authorities may protect and promote the health and welfare of the inhabitants of the Commonwealth by assisting in the acquisition, construction, equipping, expansion, enlargement and improvement of medical facilities and facilities for the residence or care of the aged in order to provide modern and efficient medical services to the inhabitants of the Commonwealth and care of the aged of the Commonwealth in accordance with their special needs and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare. It is not intended hereby that any such authority shall itself be authorized to operate any such medical facility or facility for the residence or care of the aged.

This chapter shall be liberally construed in conformity with these intentions. The amendments to this code section adopted by the 1975 session of the General Assembly shall not be construed to affect any litigation pending in any court prior to the effective date of said amendments. (1966, c. 651; 1972, c. 783; 1975, c. 489; 1977, c. 619.)

§ 15.1-1376. Creation of industrial development authorities.—(a) The governing body of any municipality in this Commonwealth is hereby authorized to create by ordinance a political subdivision of the Commonwealth, with such public and corporate powers as are set forth

in this chapter. Any such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter, which ordinance of limitation may, from time to time, be amended. In the absence of any such limitation, an authority shall have all powers granted under this chapter. (1975, c. 254.)

§ 15.1-1377. Directors; qualifications; terms, vacancies; expenses; quorum; records.—The authority shall be governed by a board of directors in which all powers of the authority shall be vested and which board shall be composed of seven directors, appointed by the governing body of the municipality. The seven directors shall be appointed initially for terms of one, two, three and four years; two being appointed for one year terms; two being appointed for two year terms; two being appointed for three year terms and one being appointed for a four year term; subsequent appointments shall be for terms of four years, except appointments to fill vacancies which shall be for the unexpired terms. Each director shall, before entering upon his duties take and subscribe the oath prescribed by § 49-1 of the Code of Virginia. No director shall be an officer or employee of the municipality. The directors shall elect from their membership a chairman, a vice-chairman, and from their membership or not, as they desire, a secretary and a treasurer, or a secretary-treasurer. The directors shall receive no salary but shall be reimbursed for necessary traveling and other expenses incurred in the performance of their duties. Four members of the board of directors shall constitute a quorum of the board for the purposes of conducting its business and exercising its powers and for all other purposes, except that no facilities owned by the authority shall be leased or disposed of in any manner without a majority vote of the members of the board of directors. No vacancy in the membership of the board shall impair the right of a quorum to exercise all the powers and perform all the duties of the board. The

board shall keep detailed minutes of its proceedings, which shall be open to public inspection at all times. It shall keep suitable records of all its financial transactions and shall arrange to have the same audited annually. Copies of each such audit shall be furnished to the governing body of the municipality and shall be open to public inspection. (1966, c. 651.)

§ 15.1-1378. Powers of authority.—The authority shall have the following powers together with all powers incidental thereto or necessary for the performance of those hereinafter stated: (a) to sue and be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties; (b) to adopt and use a corporate seal and to alter the same at pleasure; (c) to contract and be contracted with; (d) to acquire, whether by purchase, exchange, gift, lease or otherwise, and to improve, maintain, equip and furnish one or more authority facilities including all real and personal properties which the board of directors of the authority may deem necessary in connection therewith and regardless of whether or not any such facilities shall then be in existence; (e) to lease to others any or all of its facilities and to charge and collect rent therefor and to terminate any such lease upon the failure of the lessee to comply with any of the obligations thereof; and to include in any such lease, if desired, a provision that the lessee thereof shall have options to renew such lease or to purchase any or all of the leased facilities, or that upon payment of all of the indebtedness of the authority it may lease or convey any or all of its facilities to the lessee thereof with or without consideration; (f) to sell, exchange, donate, and convey any or all of its facilities or properties whenever its board of directors shall find any such action to be in furtherance of the purposes for which the authority was organized; (g) to issue its bonds for the purpose of carrying out any of its powers including specifically, but without intending to limit any

power conferred by this section or this chapter, the issuance of bonds to provide long-term financing of any pollution control facility, whether any such facility was constructed prior to or after the enactment hereof or the receipt of a commitment from an authority to undertake financing pursuant hereto, unless the major part of the proceeds of such bonds will be used to redeem any prior long-term financing of such facility other than financings pursuant to this chapter or any similar law; (h) as security for the payment of the principal of and interest on any bonds so issued and any agreements made in connection therewith, to mortgage and pledge any or all of its facilities or any part or parts thereof, whether then owned or thereafter acquired, and to pledge the revenues therefrom or from any part thereof; (i) to employ and pay compensation to such employees and agents, including attorneys, as the board of directors shall deem necessary in carrying on the business of the authority; (j) to exercise all powers expressly given the authority by the governing body of the municipality which established the authority and to establish bylaws and make all rules and regulations, not inconsistent with the provisions of this chapter, deemed expedient for the management of the authority's affairs; (k) to appoint an industrial advisory committee to advise the authority, consisting of such number of persons as it may deem advisable; however, such persons shall not receive any compensation for their services, but may be reimbursed for necessary traveling and other expenses incurred while on the business of the authority; and (l) to borrow money and to accept contributions, grants and other financial assistance from the United States of America and agencies or instrumentalities thereof, the Commonwealth, or any political subdivision, agency, or public instrumentality of the Commonwealth, for or in aid of the construction, acquisition, ownership, maintenance or repair of the authority facilities or for the payment of principal of any bond of the

authority, interest thereon, or other cost incident thereto, and to this end the authority shall have the power to comply with such conditions and to execute such agreements, trust indentures, and other legal instruments as may be necessary, convenient or desirable and to agree to such terms and conditions as may be imposed. The authority shall not have power to operate any facility as a business other than as lessor; provided, however, that the authority shall have the power to apply for, establish, operate and maintain a foreign-trade zone in accordance with the provisions of chapter 14 (§ 62.1-159 et seq) of Title 62.1. Any meeting held by the board of directors at which formal action is taken shall be open to the public. (1966, c. 651; 1970, c. 598; 1972, c. 783; 1973, c. 528.)

§ 15.1-1379. Issuance of bonds, notes and other obligations of authority.—(a) The authority shall have the power to issue bonds from time to time in its discretion, for any of its purposes, including the payment of all or any part of the cost of authority facilities and including the payment or retirement of bonds previously issued by it. All bonds issued by the authority shall be payable solely from the revenues and receipts derived from the leasing or sale by the authority of its facilities or any part thereof and the authority may issue such types of bonds as it may determine, including (without limiting the generality of the foregoing) bonds payable, both as to principal and interest: (i) from its revenues and receipts generally; (ii) exclusively from the revenues and receipts of a particular facility; or (iii) exclusively from the revenues and receipts of certain designated facilities whether or not they are financed in whole or in part from the proceeds of such bonds. Unless otherwise provided in the proceeding authorizing the issuance of the bonds, or in the trust indenture securing the same, all bonds shall be payable solely and exclusively from the revenues and receipts of a particular facility. Bonds may

be executed and delivered by the authority at any time and from time to time, may be in such form and denominations and of such terms and maturities, may be in registered or bearer form either as to principal or interest or both, may be payable in such installments and at such time or times not exceeding forty (40) years from the date thereof, may be payable at such place or places whether within or without the Commonwealth, may bear interest at such rate or rates, may be payable at such time or times and at such place or places, may be evidenced in such manner, and may contain such provisions not inconsistent herewith, all as shall be provided and specified by the board of directors in authorizing each particular bond issue. If deemed advisable by the board of directors, there may be retained in the proceedings under which any bonds of the authority are authorized to be issued an option to redeem all or any part thereof as may be specified in such proceedings, at such price or prices and after such notice or notices and on such terms and conditions as may be set forth in such proceedings and as may be briefly recited on the face of the bonds, but nothing herein contained shall be construed to confer on the authority any right or option to redeem any bonds except as may be provided in the proceedings under which they shall be issued. Any bonds of the authority may be sold at public or private sale in such manner and from time to time as may be determined by the board of directors of the authority to be most advantageous, and the authority may pay all costs, premiums and commissions which its board of directors may deem necessary or advantageous in connection with the issuance thereof. Issuance by the authority of one or more series of bonds for one or more purposes shall not preclude it from issuing other bonds in connection with the same facility or any other facility, but the proceedings whereunder any subsequent bonds may be issued shall recognize and protect any prior pledge or mortgage made

for any prior issue of bonds. Any bonds of the authority at any time outstanding may from time to time be refunded by the authority by the issuance of its refunding bonds in such amount as the board of directors may deem necessary, but not exceeding an amount sufficient to refund principal of the bonds so to be refunded, together with any unpaid interest thereon and any costs, premiums or commissions necessary to be paid in connection therewith. Any such refunding may be effected whether the bonds to be refunded shall have then matured or shall thereafter mature, either by sale of the refunding bonds and the application of the proceeds thereof to the payment of the bonds to be refunded thereby, or by the exchange of the refunding bonds for the bonds to be refunded thereby, with the consent of the holders of the bonds so to be refunded, and regardless of whether or not the bonds to be refunded were issued in connection with the same facilities or separate facilities, and regardless of whether or not the bonds proposed to be refunded shall be payable on the same date or on different dates or shall be due serially or otherwise.

(b) All bonds shall be signed by the chairman of the authority or shall bear his facsimile signature, and the corporate seal of the authority or a facsimile thereof shall be impressed or imprinted thereon and attested by the signature of the secretary (or the secretary-treasurer) of the authority, and any coupons attached thereto shall bear the facsimile signature of said chairman. In case any officer whose signature or a facsimile of whose signature shall appear on any bonds or coupons shall cease to be an officer before delivery of such bonds, such signature or such facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery.

(c) If the proceeds derived from a particular bond issue, due to error of estimates or otherwise, shall be less

than the cost of the authority facilities for which such bonds were issued, additional bonds may in like manner be issued to provide the amount of such deficit, and unless otherwise provided in the proceedings authorizing the issuance of the bonds of such issue or in the trust indenture securing the same, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the bonds of the first issue. If the proceeds of the bonds of any issue shall exceed such cost, the surplus may be deposited to the credit of the sinking fund for such bonds or may be applied to the payment of the cost of any additions, improvements or enlargements of the authority facilities for which such bonds shall have been issued.

(d) Prior to the preparation of definitive bonds, the authority may, under like restrictions, issue interim receipts or temporary bonds with or without coupons, exchangeable for definitive bonds when such bonds shall have been executed and are available for delivery. The authority may also provide for the replacement of any bonds which shall become mutilated or shall be destroyed or lost. Bonds may be issued under the provisions of this chapter without obtaining the consent of any department, division, commission, board, bureau or agency of the Commonwealth, and without any other proceedings or the happening of any other conditions or things other than those proceedings, conditions or things which are specifically required by this chapter; provided, however, that nothing contained in this chapter shall be construed as affecting the powers and duties now conferred by law upon the State Corporation Commission.

(e) All bonds issued under the provisions of this chapter shall have and are hereby declared to have all the qualities and incidents of and shall be and are hereby made negotiable instruments under the Uniform Commercial Code of Virginia, subject only to provisions respecting registration of the bonds.

(f) In addition to all other powers granted to the authority by this chapter, the authority is authorized to provide for the issuance, from time to time, of notes or other obligations of the authority for any of its authorized purposes. All of the provisions of this chapter which relate to bonds or revenue bonds shall apply to such notes or other obligations insofar as such provisions may be appropriate. (1966, c. 651; 1968, c. 687.)

§ 15.1-1380. Liability of Commonwealth, political subdivisions, directors and officers.—(a) Bonds issued pursuant to the provisions of this chapter shall not be deemed to constitute a debt or a pledge of the faith and credit of the Commonwealth, or any political subdivision thereof, including the municipality which created the authority issuing such bonds, but such bonds shall be payable solely from the funds provided therefor as herein authorized. All such bonds shall contain on the face thereof a statement to the effect that neither the Commonwealth, nor any political subdivision thereof, nor the authority shall be obligated to pay the same or the interest thereon or other costs incident thereto except from the revenues and moneys pledged therefor and that neither the faith and credit nor the taxing power of the Commonwealth, or any political subdivision thereof, is pledged to the payment of the principal of such bonds or the interest thereon or other costs incident thereto.

(b) Neither the directors of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

(c) All expenses incurred in carrying out the provisions of this chapter shall be payable solely from the funds of the authority and no liability or obligation shall be incurred by the authority hereunder beyond the extent to which moneys shall be available to the authority.

(d) Bonds issued pursuant to the provisions of this chapter shall not constitute an indebtedness within the

meaning of any debt limitation or restriction. (1966, c. 651.)

§ 15.1-1381. Security for payment of bonds; default.—The principal of and interest on any bonds issued by the authority shall be secured by a pledge of the revenues and receipts out of which the same shall be made payable, and may be secured by a trust indenture covering all or any part of the authority facilities from which revenues or receipts so pledged may be derived, including any enlargements of and additions to any such projects thereafter made. The resolution under which the bonds are authorized to be issued and any such trust indenture may contain any agreements and provisions respecting the maintenance of the projects covered thereby, the fixing and collection of rents for any portions thereof leased by the authority to others, the creation and maintenance of special funds from such revenues and the rights and remedies available in the event of default, all as the board of directors shall deem advisable not in conflict with the provisions hereof. Each pledge, agreement and trust indenture made for the benefit or security of any of the bonds of the authority shall continue effective until the principal of and interest on the bonds for the benefit of which the same were made shall have been fully paid. In the event of default in such payment or in any agreements of the authority made as a part of the contract under which the bonds were issued, whether contained in the proceedings authorizing the bonds or in any trust indenture executed as security therefor, may be enforced by mandamus, suit, action or proceeding at law or in equity to compel the authority and the directors, officers, agents or employees thereof to perform each and every term, provision and covenant contained in any trust indenture of the authority, the appointment of a receiver in equity or by foreclosure of any such trust indenture or any one or more of said remedies. (1966, c. 651.)

§ 15.1-1382. Rents, fees and other charges.—The authority shall fix and revise from time to time the rents, fees and other charges to be paid to it in connection with the lease or sale of various authority facilities and for any other services furnished or provided by the authority. Such rents, fees and charges shall be fixed so as to provide at least sufficient funds to pay the cost of maintaining, repairing and operating such projects and the principal and interest of any bonds issued by the authority or other debts contracted as the same shall become due and payable. The authority and the political subdivision in which all or any part of a particular authority facility is located may agree on payment by the authority on account of governmental services to be rendered by the political subdivision in such amounts as the authority may find to be consistent with the purposes of this chapter. A reserve may be accumulated and maintained out of the revenues and receipts of the authority for extraordinary repairs and expenses and for such other purposes as may be provided in any resolution authorizing a bond issue or in any trust indenture securing the authority's bonds. Subject to such provisions and restrictions as may be set forth in the resolution or in the trust indenture authorizing or securing any of the bonds or other obligations hereunder, the authority shall have exclusive control of the revenues and receipts derived from the lease or sale of any authority facility and the right to use the revenues and receipts in the exercise of its powers and duties set forth in this chapter. (1966, c. 651; 1968, c. 687; 1973, c. 528.)

§ 15.1-1383. Exemption from taxation.—The authority is hereby declared to be performing a public function in behalf of the municipality with respect to which the authority is created and to be a public instrumentality of such municipality. Accordingly, the income, including any profit made on the sale thereof from all bonds issued by the authority, shall at all times be exempt from all

taxation by the Commonwealth or any political subdivision thereof. (1966, c. 651.)

§ 15.1-1384. Authority to be nonprofit; excess earnings.—The authority shall be nonprofit and no part of its net earnings remaining after payment of its expenses shall enure to the benefit of any individual, firm or corporation, except that in the event the board of directors of the authority shall determine that sufficient provision has been made for the full payment of the expenses, bonds and other obligations of the authority then any net earnings of the authority thereafter accruing shall be paid to the municipality with respect to which the authority was created; provided, however, that nothing herein contained shall prevent the board of directors from transferring all or any part of its facilities or properties in accordance with the terms of any contract entered into by the authority. (1966, c. 651; 1973, c. 528.)

§ 15.1-1385. Dissolution of authority; disposition of property.—Whenever the board of directors of the authority shall by resolution determine that the purposes for which the authority was formed have been substantially complied with and all bonds theretofore issued and all obligations theretofore incurred by the authority have been fully paid, the then members of the board of directors of the authority shall thereupon execute and file for record with the governing body of the municipality which created the authority, a resolution declaring such facts. If the governing body of the municipality which created the authority is of the opinion that the facts stated in the authority's resolution are true and that the authority should be dissolved, it shall so resolve and the authority shall stand dissolved. Upon such dissolution, the title to all funds and properties owned by the authority at the time of such dissolution shall vest in the municipality creating the authority and possession of such funds and

properties shall forthwith be delivered to such municipality. (1966, c. 651.)

§ 15.1-1386. Bonds as legal investments and lawful security.—The bonds issued pursuant to this chapter shall be and are hereby declared to be legal and authorized investments for banks, savings banks, trust companies, building and loan associations, insurance companies, fiduciaries, trustees, guardians and for all public funds of the Commonwealth of Virginia or other political corporations or subdivisions of the Commonwealth. Such bonds shall be eligible to secure the deposit of any and all public funds of the Commonwealth of Virginia, and any and all public funds of cities, towns, counties, school districts or other political corporations or subdivisions of the Commonwealth of Virginia, and such bonds shall be lawful and sufficient security for said deposits to the extent of their value when accompanied by all unmatured coupons appertaining thereto. (1966, c. 651.)

§ 15.1-1387. Authorities acting jointly.—The powers herein conferred upon authorities created under this chapter may be exercised by two or more authorities acting jointly. Two or more municipalities, as herein defined, may jointly create an authority, in which case the directors of such authority shall be appointed by the concurring action of the governing bodies of such municipalities. (1966, c. 651.)

§ 15.1-1388. Facility sites.—Any municipality may acquire a facility site by gift, purchase or lease and may transfer any facility site to an authority by sale, lease or gift. Such transfer may be authorized by a resolution of the governing body of the municipality without submission of the question to the voters and without regard to the requirements, restrictions, limitations or other provisions contained in any other general, special or local law. Such facility sites may be located within or without or partially within or without the municipality creating the authority. (1966, c. 651.)

§ 15.1-1389. Provisions of chapter cumulative; construction.—Neither this chapter nor anything herein contained shall be construed as a restriction or limitation upon any powers which the authority might otherwise have under any laws of this Commonwealth, but shall be construed as cumulative of any such powers. No proceedings, notice or approval shall be required for the organization of the authority or the issuance of any bonds or any instrument as security therefor, except as herein provided, any other law to the contrary notwithstanding; provided, that nothing herein shall be construed to deprive the Commonwealth and its political subdivisions of their respective police powers over properties of the authority or to impair any power thereover of any official or agency of the Commonwealth and its political subdivisions which may be otherwise provided by law. Nothing contained in this chapter shall be deemed to authorize the authority to occupy or use any land, streets, buildings, structures or other property of any kind, owned or used by any political subdivision within its jurisdiction, or any public improvement or facility maintained by such political subdivision for the use of its inhabitants, without first obtaining the consent of the governing body thereof. (1966, c. 651.)

§ 15.1-1390. Powers, etc., severable; provisions of chapter controlling over other statutes and charters.—The powers granted and the duties imposed in this chapter shall be construed to be independent and severable. If any one or more sections, subsections, sentences, or parts of any of this chapter shall be adjudged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. Any provision of this chapter which is found to be in conflict with any other statute or charter shall be controlling and shall supersede such other statute or charter to the extent of such conflict. (1966, c. 651.)

§§ 15.1-1391 to 15.1-1399: Reserved.

CHAPTER 14

Hospital or Health Center Commissions Act, Va. Code § 32-276 *et seq.* (Supp. 1977)

§ 32-276. Creation of commission.—In each city, county and town, and in each group of two or more of such political subdivisions of which the governing bodies thereof shall declare by proper resolution that there is need of a hospital or health center to function therein, there shall be created a public body corporate, with such public and corporate powers as are set forth in this chapter, to be known as the hospital or health center commission thereof; provided, however, that such commission shall not transact any business or exercise its powers hereunder until or unless the governing body of the subdivision, or the governing bodies of the subdivisions in the event more than one unite for the purpose, shall declare that there is need for a hospital or health center commission to function therein. (1946, p. 577; Michie Suppl. 1946, § 1554(8); 1950, p. 243.)

§ 32-276.1. Definitions.—As used in this chapter, "*hospital*" or "*health center*" shall mean any facility for the examination, care or treatment of sick or infirm persons, including nursing homes. "*Bonds*" as used in this chapter shall include any interest bearing obligation including promissory notes. (1975, c. 295.)

§ 32-277. When governing bodies may declare need for commission.—The governing body or bodies, as the case may be, may adopt a resolution declaring that there is need for a hospital or health center commission in such political subdivision or subdivisions, if it or they shall find that the public health and welfare, including the health and welfare of persons of low income in such subdivision or subdivisions and surrounding area require the acquisition, construction or operation of public hos-

pital facilities for the inhabitants thereof. (1946, p. 577; Michie Suppl. 1946, § 1554(8).)

§ 32-278. Effect of adoption of resolution.—In any suit, action, or proceeding involving the validity or enforcement of or relating to any contract of the hospital or health center commission, such commission shall be conclusively deemed to have become created as a body corporate, and to have become established and authorized to transact business and exercise its powers hereunder, upon proof of the adoption of a resolution by the governing body of each city, county or town for which the commission is created declaring that there is need for such commission, and, if more than one political subdivision is involved, that it unites with the other political subdivisions in declaring such needs. A copy of such resolution, duly certified by the clerk of the city, county or town by which it is adopted, shall be admissible in evidence in any suit, action or proceeding. (1946, p. 577; Michie Suppl. 1946, § 1554(8); 1950, p. 243.)

§ 32-279. Members of commission; quorum; expenses; removal and vacancies.—A hospital or health center commission shall consist of the following number of members based upon the number of political subdivisions participating: for one political subdivision, five members; for two, six members; for three, six members; for four, eight members; and for more than four, one member for each of the participating subdivisions. The respective members shall be appointed by the governing bodies of the subdivisions they represent, shall be residents of such subdivisions, and shall be appointed for such terms as the appointing body shall designate. The members of the commission so appointed shall constitute the commission, and the powers of the commission conferred by this chapter shall be vested in and exercised by the members in office from time to time. A majority of the members in office shall constitute a quorum. The commission shall

elect its own chairman, and shall adopt rules and regulations for its own procedure and government. The members of the commission shall receive no compensation for their services, but shall be paid their actual expenses incurred in the performance of their duties. Any member of the commission may be removed at any time by the governing body appointing him, and vacancies on the commission shall be filled for the unexpired terms. (1946, p. 578; Michie Suppl. 1946, § 1554(9).)

§ 32-280. Powers of commission.—Any hospital or health center commission established hereunder shall have all powers necessary or convenient to carry out the general purposes of this chapter, including the following powers in addition to others herein granted:

(1) *In general.*—To sue and be sued; to adopt a seal and alter the same at pleasure; to have perpetual succession; and to make and execute contracts and other instruments necessary or convenient to the exercise of its powers.

(2) *Officers, agents and employees.*—To employ such technical experts, and such other officers, agents and employees as it may require, to fix their qualifications, duties and compensation and to remove such employees at pleasure.

(3) *Acquisition of property.*—To acquire within the territorial limits of the political subdivisions for which it is formed, by purchase, lease, gift or otherwise, whatever lands, buildings and structures may be reasonably necessary for the purpose of establishing, constructing, enlarging, maintaining and operating one or more hospitals or health centers.

(4) *Construction.*—To acquire, establish, construct, enlarge, improve, maintain, equip and operate any hospital or health center, and any other facilities and services for the care and treatment of sick persons.

(5) *Rules and regulations for management.*—To make and enforce rules and regulations for the management and conduct of its business and affairs and for the use, maintenance and operation of its facilities and properties.

(6) *Acceptance of donations.*—To accept gifts and grants from the State or any political subdivision thereof, and from the United States and any of its agencies; and to accept donations of money, personal property or real estate, and take title thereto from any person, firm, corporation or association.

(7) *Rules and regulations as to patients.*—To make rules and regulations governing the admission, care and treatment of patients in such hospital or health center, to classify patients as to charges to be paid by them, if any, and to determine the nature and extent of the service to be rendered patients.

(8) *Federal and State aid.*—To comply with the provisions of the laws of the United States and the State, and any rules and regulations made thereunder, for the expenditures of federal or State money in connection with hospitals or health centers, and to accept, receive and receipt for federal and State money granted the commission, or granted any of the political subdivisions for which it is formed, for hospital or health center purposes.

(9) *Borrowing money.*—To borrow money upon its bonds, notes, debentures, or other evidences of indebtedness issued for the purpose only of acquiring, constructing, improving, furnishing or equipping buildings or structures for use as a hopsital or health center, and to secure the same by pledges of its revenues as hereafter provided.

(10) *Execution of instruments for borrowing.*—To execute all instruments necessary or convenient in connection with the borrowing of money and the issuance of bonds as herein authorized.

(11) *Leases and construction agreements.*—To enter into leases and agreements with persons, firms, corporations, associations or other groups which provide for the construction and/or operation of a hospital or health center by such persons, firms, corporations, associations or other groups on land of the commission.

(12) *Management agreements.*—To contract with persons, firms, corporations, associations or other groups as it may deem appropriate for the management and operation of any hospital or health center subject to the control of the commission; however, the commission may agree that it will charge such rates for service as will enable it to make reasonable compensation for such management and operation. (1946, p. 578; Michie Suppl. 1946, § 1554(10); 1975, c. 295.)

§ 32-281. Appropriations to commission.—Any political subdivision for which the commission is created is authorized to make appropriations to the commission from available funds, or from funds provided for the purpose by bond issues, for the acquisition of land or improvements to land, and/or the construction, improvement, maintenance and operation of any hospital or health center operated or controlled or proposed to be operated or controlled by the commission. The political subdivision may also transfer to the commission, with or without consideration, real or personal property for any or all of such purposes. (1946, p. 579; Michie Suppl. 1946, § 1554(11); 1975, c. 295.)

§ 32-281.1. Issuance of bonds by political subdivisions and validation thereof.—Any political subdivision for which the commission is created may issue its general obligation bonds in the manner provided in the Public Finance Act in furtherance of the establishment, construction and enlargement of a hospital or health center; and all such bonds issued prior to June one, nineteen hundred seventy-five, for such purposes by any political

subdivision are hereby ratified, validated and confirmed, and all proceedings taken prior to such date to authorize the issuance of bonds for such purposes by any political subdivision are hereby ratified, validated and confirmed, and all such bonds may be issued pursuant to the Public Finance Act. (1975, c. 295.)

§ 32-282. Issuance and sale of bonds.—Any bonds issued by a hospital or health center commission may be issued in one or more series, shall bear such date or dates, mature at such time or times, bear interest at such rate or rates not to exceed four per centum per annum payable at such time or times, be in such denominations, be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, be subject to such terms or redemption, with or without premium, as the commission by resolution may prescribe. Such bonds may be sold at public or private sale for such price or prices as the commission shall determine, provided that the interest cost to maturity of the money received from any issue of such bonds shall not exceed four per centum per annum. (1946, p. 579; Michie Suppl. 1946, § 1554(12).)

§ 32-283. Provisions to secure payment of bonds.—Any resolution or resolutions of the commission authorizing the issuance of any bonds may contain provisions, which shall be a part of the contract with the holders of the bonds, pledging any or all revenues of the hospital or health center to secure the payment of the interest on such bonds and to create a sinking fund to retire the principal thereof at maturity; providing for such schedule of fees and charges as will produce funds sufficient to pay operating costs and debt service until such bonds are retired; and prescribing the rights, obligations, powers and duties of the commission, the trustee under any trust indenture under which the bonds are issued,

and the bondholders, in connection with or pertaining to such bonds. (1946, p. 579; Michie Suppl. 1946, § 1554(13).)

§ 32-284. Bonds made legal investments.—Any bonds issued pursuant to the authority of this chapter are hereby made securities in which all public officers and bodies of this State and all political subdivisions thereof, all insurance companies and associations, all savings banks and savings institutions, including savings and loan associations, in the State may properly and legally invest funds in their control. (1946, p. 579; Michie Suppl. 1946, § 1554(14).)

§ 32-286. Property of commission exempt from foreclosure or execution sale and judgment lien.—No interest of the commission in any property, real or personal, shall be subject to sale by foreclosure of a mortgage, trust indenture, or any other instrument thereon or relating thereto, either through judicial proceedings or the exercise of a power of sale contained in the instrument. All property of the commission shall be exempt from levy and sale by virtue of an execution, and no execution or judicial process shall issue against such commission. No judgment against the commission shall be a charge or lien upon its property, real or personal. Nothing contained

§ 32-285. Bonds payable from revenues of hospital or health centers.—Any bonds issued under this chapter shall be payable only from the revenues and receipts of the hospital or health center for the acquisition, establishment or construction of which the bonds were issued. The bonds and other obligations of the commission shall not be a debt of any city, county or town or of the Commonwealth, and neither the members of the commission nor any person executing the bonds or other obligations shall be liable personally thereon by reason of the issuance thereof. (1946, p. 580; Michie Suppl. 1946, § 1554(15); 1950, p. 244.)

in this section shall prohibit the owner of a leasehold interest granted by the commission from granting a lien or other security interest in his leasehold which would be subject to sale or foreclosure as provided in any instrument creating the lien or other security interest. (1946, p. 580; Michie Suppl. 1946, § 1554(16); 1975, c. 295.)

§ 32-287. Receiver.—The commission may, by its trust indenture given to secure bond issues or other obligations, provide for the appointment of a receiver of the hospital or health center or that part thereof acquired or constructed from funds received from a sale of bonds secured by the pledge of its revenues. If any such receiver be appointed, he may enter and take possession of such hospital or health center or part thereof, and operate and maintain same, and collect and receive all fees, rents, revenues or other charges arising therefrom in the same manner as the commission might do, and keep such moneys in a separate account or accounts, and apply the same in accordance with the obligations of the commission as the court shall direct. (1946, p. 580; Michie Suppl. 1946, § 1554(17).)

§ 32-288. Eminent domain.—The commission shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this chapter after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The commission may exercise the power of eminent domain pursuant to the provisions of any applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain by any city, county or town.

Property already devoted to a public use may be acquired, provided, that no property belonging to any city, county or town or to any government or to any religious

or charitable corporation may be acquired without its consent. (1946, p. 580; Michie Suppl. 1946, § 1554(18); 1950, p. 244.)

§ 32-289. Records and reports.—The commission shall keep and preserve complete records of its operations, and transactions, which records shall be open to inspection by the participating subdivisions at all times. It shall make reports to such subdivisions annually, and at such other times as they may require. (1946, p. 580; Michie Suppl. 1946, § 1554(19).)

§ 32-290. Federal aid.—The State Board of Health is authorized to apply for and accept on behalf of the State, with the written consent and approval of the Governor first obtained, federal grants or advances for the construction of public and other nonprofit hospitals and related facilities, such grants or advances under rules, regulations or plans adopted by the Board to be expended, disbursed or allocated in accordance with the purposes for which such grants or donations were made; the Board is designated as the sole agency of the State to accept, allocate, and disburse such funds, to supervise the execution of all plans for such hospitals and related facilities and to certify whether or not same qualify under the terms of any such grant.

The funds so granted or advanced shall be deposited in the State treasury in a special fund and paid out on warrants of the Comptroller on vouchers signed by the State Health Commissioner. (1946, p. 366; Michie Suppl. 1946, § 1554(21).)

§ 32-290.1. When court may enter order declaring need for commission no longer exists.—Whenever it shall appear to the members of a commission that the need, as stated in § 32-277, for such commission no longer exists, then upon petition by the members to any court of record in such political subdivision or in any of such political subdivisions after giving ten days notice to the county,

city or town or combination thereof which established such commission under §§ 32-276 and 32-277, and upon the production of satisfactory evidence in support of such petition, the court may, in its discretion, enter an order declaring that the need for such commission in the county, city, or town no longer exists, and approving a plan for the winding up of the business of the commission, the payment or assumption of its obligations, and the transfer of its assets. (1970, c. 150.)

§ 32-290.2. Finality of order; effect.—If the court enters an order as provided in § 32-290.1 that the need for the commission no longer exists, such order shall be final and, except for the winding up of its affairs in accordance with the plan approved by the court, its authorities, powers and duties to transact business or to function shall cease to exist as of the date set forth in the order of the court. (1970, c. 150.)

§ 32-290.3. Appeal from order; supersedeas.—Any party aggrieved by such order may apply for an appeal to the Supreme Court of Appeals and a supersedeas may be granted in the same manner as is now or hereafter shall be provided by law and the rules of court applicable to civil cases. (1970, c. 150.)

Hospital Authorities Law,
Va. Code § 32-212 *et seq.* (Supp. 1977)
(In Pertinent Part)

ARTICLE 1.

In General.

§ 32-212. Short title.—This chapter may be referred to as the Hospital Authorities Law. (1946, p. 281; Michie Suppl. 1946, § 1554(22).)

§ 32-213. Finding and declaration of necessity.—It is declared that conditions resulting from the concentration of population of various cities and towns of the State require the construction, maintenance and operation of adequate hospital facilities for the care of the public health and for the control and treatment of epidemics, for the care of the indigent and for the public welfare; that in various cities of the State there is a lack of adequate hospital facilities available to the inhabitants thereof and that consequently many persons including persons of low income are forced to do without adequate medical and hospital care and accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the State and impair economic values; that the aforesaid conditions also exist in certain areas surrounding such cities; that these conditions cannot be remedied by the ordinary operations of private enterprises; that the providing of adequate hospital and medical care are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that adequate hospital and medical facilities and care be provided in such concentrated centers of population in order to care for and protect the health and public welfare; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination. (1946, p. 281; Michie Suppl. 1946, § 1554(23).)

§ 32-214. Definitions.—The following terms, wherever used or referred to in this chapter, shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "*Authority*" or "*hospital authority*" means a public body and a body corporate and politic organized in accordance with the provisions of this chapter for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "*City*" means any city in the Commonwealth. "*The city*" means the particular city for which a particular hospital authority is created.

(3) "*Council*" means the council, or other body charged with governing the city.

(4) "*City clerk*" and "*mayor*" mean the clerk of the council and mayor respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor respectively.

(5) "*Commissioner*" means one of the members of an authority appointed in accordance with the provisions of this chapter.

(6) "*Government*" includes the State and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(7) "*State*" means the Commonwealth of Virginia.

(8) "*Federal government*" includes the United States of America, the Federal Emergency Administration of Public Works or any agency, instrumentality, corporate or otherwise, of the United States of America.

(9) "*Hospital project*" or "*project*" means all facilities suitable for providing adequate hospital facilities and medical care for concentrated centers of population, and shall also include any and all structures, buildings, improvements, additions, extensions, replacements, appurtenances, lands, rights in land, franchises, machinery, equipment, furnishings, landscaping, approaches, roadways and other facilities necessary or desirable in connection therewith or incidental thereto.

(10) "*Bonds*" shall mean any bonds, interim certificates, notes, debentures, or other obligations of the authority issued pursuant to this chapter.

(11) "*Trust indenture*" includes instruments pledging the revenues of real or personal properties but not conveying such properties or conferring a right to foreclose and cause a sale thereof.

(12) "*Contract*" means any agreement of an authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.

(13) "*Real property*" includes lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgments, mortgage or otherwise.

(14) "*Obligee of the authority*" or "*obligee*" includes any bondholder, trustee or trustees for any bondholders, any lessor demising property to the authority used in connection with a hospital project or any assignee or assignees of such lessor's interest or any part thereof, and the United States of America when it is a party to any contract with the authority. (1946, p. 282; Michie Suppl. 1946, § 1554(24).)

(15) "*Cost,*" as applied to a hospital project, means all or any part of the cost of acquisition, construction, alteration, enlargement, reconstruction and

§ 32-215. Creation of hospital authorities.—In each city there shall be a political subdivision of the Com-

monwealth, with such public and corporate powers as are set forth in this chapter, to be known as the "hospital authority" of the city. (1946, p. 283; Michie Suppl. 1946, § 1554(25).)

§ 32-216. Not to function until council declares need.—Such authority shall not transact any business or exercise its powers hereunder until or unless the council of the city, by proper resolution shall declare at any time hereafter that there is need for an authority to function in such city. (1946, p. 283; Michie Suppl. 1946, § 1554 (25).)

§ 32-217. How need determined.—The determination as to whether or not there is such need for an authority to function, (1) may be made by the governing body on its own motion, or (2) may be made by the governing body upon the filing of a petition signed by one hundred freeholders of the city, asserting that there is need for an authority to function in such city, and requesting that the council so declare. (1946, p. 283; Michie Suppl. 1946, § 1554(25).)

§ 32-218. What constitutes need.—The council may adopt a resolution declaring that there is need for a hospital authority in the city, if it shall find (1) that there is a lack of adequate hospital facilities and medical accommodations from the operations of private enterprises in the city and surrounding area, or (2) that the public health and welfare, including the health and welfare of persons of low income in the city and surrounding area require the construction, maintenance or operations of public hospital facilities for the inhabitants thereof. (1946, p. 283; Michie Suppl. 1946, § 1554(25).)

* * * *

§ 32-233. Appropriations by city.—The governing body of any city in which the authority is located may make

appropriations for the improvement, maintenance or operation of any public hospital or hospital project constructed, maintained, or operated by or to be constructed, maintained or operated by an authority. (1946, p. 293; Michie Suppl. 1946, § 1554(43).)

§ 32-234. Conveyance, lease or transfers of property by a city to an authority.—Any city in order to provide for the construction, reconstruction, improvement, repair or management of any hospital or hospital project, or in order to accomplish any of the purposes of this chapter may, with or without consideration or for a nominal consideration, lease, sell, convey or otherwise transfer to an authority, within such city, any real, personal or mixed property including, but not limited to, any existing hospital or hospital project as a going concern or otherwise, and including the assignment and transfer of any part of or all money, choses in action and other assets used or held for the use of such hospital or hospital project, and in connection with any such transaction the authority involved may accept such lease, transfer, assignment and conveyance and bind itself to the performance and observance of any agreements and conditions attached thereto. (1946, p. 293; Michie Suppl. 1946, § 1554(44).)

§ 32-235. Chapter controlling.—Insofar as the provisions of this chapter are inconsistent with the provisions of any other law, the provisions of this chapter shall be controlling, provided that nothing in this chapter shall prevent any municipality from establishing, equipping, and operating a hospital or hospitals or improving or extending existing hospitals and hospital facilities under the provisions of its charter or any general law other than this chapter. (1946, p. 293; Michie Suppl. 1946, § 1554(46).)

ARTICLE 2.

Powers.

§ 32-236. In general.—An authority shall constitute a public body and a body corporate and politic with perpetual succession, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter. It may sue and be sued and have a seal with power to alter same at pleasure. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

§ 32-237. Study and investigation concerning plan.—An authority shall have power to investigate into hospital, medical and health conditions and into the means and methods of improving such conditions; to determine where inadequate hospital and medical facilities exist; to study and make recommendations concerning the plan of any city in relation to the problem of providing adequate hospital, medical and nursing facilities, and the providing of adequate hospital, medical and nursing facilities for the inhabitants of such city and surrounding area, including persons of low income in such city and area. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

§ 32-238. Preparation and operation of hospital projects.—An authority shall have power to prepare, carry out and operate hospital projects. (1946, p. 286; Michie Suppl. 1946, § 1554(30.)

§ 32-238.1. Additional powers.—Upon authorization of the governing body of the city or county in which the authority is functioning and the governing body of any other county or city, an authority shall have power to prepare, carry out and operate hospital projects and exercise all the powers granted to such authority pursuant to the provisions of this chapter in such other county or city. (1977, c. 159.)

§ 32-239. Clinics and instruction programs.—An authority shall have power to provide and operate outpatient departments, maternity clinics and any other clinics customarily operated in hospitals in metropolitan centers and to provide teaching and instruction programs and schools for medical students, internes, physicians and nurses. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

§ 32-240. Physicians and employees.—An authority shall have power to provide and maintain continuous resident physician and interne medical services; to appoint an administrator, a superintendent or matron, and necessary assistants, and any and all other employees deemed necessary or advisable and fix their compensation, and to remove such appointees. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

* * * *

§ 32-247. Purchases or leases of hospital projects.—An authority shall have power to take over by purchase, lease or otherwise any hospital project located within its boundaries undertaken by any government, or by any city. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

§ 32-248. Acting with federal government.—An authority shall have power to act as agent for the federal government in connection with the acquisition, construction, operation and management of a hospital project, or any part thereof. (1946, p. 286; Michie Suppl. 1946, § 1554(30).)

* * * *

§ 32-250. Purchase or lease of property.—An authority shall have power to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, county, town or government. (1946, p. 287; Michie Suppl. 1946, § 1554(30).)

§ 32-251. Sale of property.—An authority shall have power to sell, exchange, transfer, or assign, any property real or personal or any interest therein to any person, firm, corporation, city, county, town or government. (1946, p. 287; Michie Suppl. 1946, § 1554(30).)

§ 32-252. Owning property.—An authority shall have power to own, hold, clear and improve property; to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable. (1946, p. 287; Michie Suppl. 1946, § 1554(30).)

§ 32-253. Borrowing money.—An authority shall have power to borrow money upon its bonds, notes, debentures, or other evidences of indebtedness and to secure the same by pledges of its revenues in the manner and to the extent hereinafter provided; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this chapter. (1946, p. 287; Michie Suppl. 1946, § 1554(30).)

• • • •

§ 32-259. Contracts with federal government.—In addition to the powers conferred upon the authority by other provisions of this chapter, the authority is empowered to borrow money and accept grants from the federal government for or in aid of the construction of any hospital project when such authority is authorized by this chapter to undertake, to take over any land acquired by the federal government for the construction of a hospital project, to take over or lease or manage any hospital project constructed or owned by the federal government, and to these ends, to enter into such contracts, trust indentures, leases, or other agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such hospital project. It is the purpose and intent of this chapter to authorize every authority to do any and

all things necessary to secure the financial aid and the cooperation of the federal government in the construction, maintenance and operation of any hospital project which the authority is empowered by this chapter to undertake. (1946, p. 292; Michie Suppl. 1946, § 1554(40).)

• • • •

ARTICLE 3.

Bonds.

§ 32-261. Authority to issue.—The authority shall have power and is hereby authorized from time to time in its discretion to issue bonds for any of its purposes, including the payment of all or any part of the cost of any hospital project and the refunding of any bonds previously issued by it. Bonds may be issued under this chapter notwithstanding any debt or other limitation prescribed in any statute and without obtaining the consent of any city, town or county, government or any commission, board, bureau or agency of any of the foregoing; and without any other proceedings or the happening of other conditions or things than those proceedings, conditions or things which are specifically required by this chapter. (1946, p. 288; Michie Suppl. 1946, § 1554(33); 1973, c. 462.)

§ 32-262. How payable.—The principal and interest on such bonds shall be payable from such sources as the authority may determine, including (without limiting the generality of the foregoing) (a) its revenues generally, (b) exclusively from the revenues and receipts of a particular hospital project, or (c) exclusively from the revenues and receipts of certain designated hospital projects, whether or not they are financed in whole or in part from the proceeds of such bonds. Any such bonds may be additionally secured by a pledge of any grant or contribution from any city, town or county or from any government or governmental authority. (1946, p. 288; Michie Suppl. 1946, § 1554(33); 1973, c. 462.)

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-826

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

v.

CITY OF FAIRFAX, *et al.*,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

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IN THE

Supreme Court of the United States

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No.

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CITY OF FAIRFAX, *et al.*,
Respondents.

MEMORANDUM OPPOSING CERTIORARI

I. The decision offered for review is not final.

The decision which Petitioners seek to have this Court review is the Fourth Circuit's ruling that the grant of summary judgement by the District Court was in error, because of the existence in the record of genuine issues of material fact. If the very decision sought to be reviewed here had been rendered by the District Court, instead of the Fourth Circuit, it would not have been appealable at all, even to the Court of Appeals, because it lacks the necessary finality.

This case does not present such an extraordinary situation as has occasionally warranted the Supreme Court's review of a nonfinal order. Here the facts are in dispute.

Petitioners characterize the Fourth Circuit's opinion below as being in conflict with decisions of the Supreme Court and of other circuits with respect to the applicability of the Sherman Act (15 U. S. C. § § 1, 2, 3) to state and local public entities. But the decision of the Fourth Circuit was that this record contains genuine issues of material fact as to:

(a) How "public" these entities really were.
(Opinion below, Appendix to Petition at 7a-10a, 13a-15a, 18a)

(b) Even if "public" whether they, as local entities, possess sufficient "sovereign" characteristics to be compared to the entities involved in the cases which Petitioners cite. (Opinion below, Appendix to Petition 7a-10a, 13a-16a)

(c) Even if public and properly empowered by the state, whether they were *acting* in a public or sovereign capacity when they committed the acts complained of. (Opinion below, Appendix to Petition 7a-10a, 13a-16a)

II. All of the questions Petitioners seek to argue were presented and argued in *City of Lafayette, La. v. Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977)(Docket No. 76-864).

Since this case will be remanded for trial if *certiorari* is denied, this Court's decision in the Lafayette case, when announced, will provide adequate guidance for those proceedings in the District Court.

Therefore, the Petition For a Writ of *Certiorari* should be denied.

Respectfully submitted,

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS TO RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

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REPLY OF PETITIONERS TO RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

I. The Court of Appeals Did Not Find That the Facts Are in Dispute.

In their memorandum opposing *certiorari*, plaintiffs assert that the Court of Appeals reversed the District Court because disputed issues of fact made summary judgment improper. This contention is patently erroneous. In reversing the District Court on the state action issue, the Court of Appeals disagreed with the legal standard employed by the District Court and thus remanded to the District Court for *further* factual findings

under the different *legal standard* established by the Court of Appeals. *See* App. 10a, 562 F.2d at 285 (Wyzanski, J.); App. 11a, 562 F.2d at 286 (Widener, J.). The Court of Appeals expressly recognized that the basic facts of this case are not in dispute, stating that "all parties took the position that . . . the issue . . . of state action [was] ripe for summary judgment." (App. 2a, 562 F.2d at 282). This comports with the express finding of the District Court that "[e]ach party agrees there are no disputed facts and that the matter is ripe for decision." (App. 27a). *See also* App. 17a, 562 F.2d at 288-89 (Hall, J., dissenting).

It is apparent that the question of whether further factual findings are necessary is dependent upon whether the Court of Appeals applied the correct legal standard. In granting summary judgment on the basis of the undisputed facts set forth in the Petition, the District Court explicitly applied the legal standard established by the Court of Appeals for the Third Circuit in *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). (App. 33a). This standard was later accepted by the Court of Appeals for the Fifth Circuit in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977) (Docket No. 76-864), and the Court of Appeals for the Seventh Circuit in *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440).[1]

[1] Plaintiffs argue that *certiorari* should not be granted because the Court of Appeals remanded the case for further proceedings. Plaintiffs ignore the fact that review of a non-final judgment was granted in *Lafayette* and that such review is appropriate where, as here, "there was a conflict on a question of law with another court of appeals . . . which would justify review of a final decree or judgment." R. Stern, E. Gressman, *Supreme Court Practice* § 4.19 at 181 (1969). Indeed, review is especially appropriate here since a decision by this Court in *Lafayette* may very well dispose of this case. (*Id.* at 180).

In reversing, the Court of Appeals rejected the legal standard employed by the District Court and the Third, Fifth and Seventh Circuits, and held that under the state-action doctrine, there is little or no difference between the acts of a municipality and the conduct of a private party. (Petition at 15-18). If this Court upholds the reasoning adopted by the Fifth Circuit in *Lafayette*, the court below must be reversed since the undisputed facts of this case establish that the challenged leasing by defendant IDA "promote[s] the health and welfare of the inhabitants of the Commonwealth" of Virginia in accordance with the "intent of the legislature" and "the policy of the Commonwealth." Industrial Development and Revenue Bond Act, Va. Code § 15.1-1375 (Supp. 1977).[2] (App. 43a).

II. *Certiorari* Must Be Granted If the District Court Is to Apply a Decision by this Court in *Lafayette*.

As plaintiffs note, if *certiorari* is denied this case will go to trial. Plaintiffs ignore the fact that such a trial will be unnecessary if the Court of Appeals erred in rejecting the legal standard of *Duke & Co., Lafayette*

[2] Section 15.1-1375 of the Industrial Development and Revenue Bond Act sets forth the purposes of the Act and states in pertinent part:

> It is the further *intent of the legislature and shall be the policy of the Commonwealth* to grant to industrial development authorities the powers contained herein with respect to medical facilities . . . to the end that such authorities may protect and promote the health and welfare of the inhabitants of the Commonwealth *by assisting in the acquisition*, construction, equipping, expansion, enlargement and improvement of medical facilities . . . *in order to provide modern and efficient medical services to the inhabitants of the Commonwealth* . . . and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare. *It is not intended hereby that any such authority shall itself be authorized to operate any such medical facility* . . . . (Emphasis supplied). (App. 43a).

and *Kurek* applied by the District Court. Moreover, in suggesting that denial of *certiorari* is proper because the District Court could be guided by a decision in *Lafayette*, plaintiffs fail to realize that unless this Court grants *certiorari* the District Court is bound by the mandate of the Court of Appeals. *See Lawlor* v. *National Screen Service Corp.*, 352 U.S. 992 (1957); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). In view of the pending decision in *Lafayette*, the Court should adhere to its established practice and grant *certiorari* and either set the case down for argument or summarily decide the case after a decision in *Lafayette*. *See* R. Stern, E. Gressman, *Supreme Court Practice* § 4.17 at 178 (1969).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, a writ of *certiorari* should issue.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1977

No. 77-826

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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April 10, 1978

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---

SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 24(5) of this Court's Rules, petitioners Industrial Development Authority of Fairfax County, Virginia ("IDA") Fairfax Hospital Association ("FHA") and Commonwealth Doctors Hospital, Inc. ("CDH') submit this Supplemental Brief for the purpose of calling to the Court's attention the application to this case of the Court's decision in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, No. 76-864, decided March 29, 1978. Petitioners respectfully submit that the decision in *Lafayette* requires summary reversal of the split decision of the Court of Appeals below.

ARGUMENT

A. The District Court Properly Held that the *Parker* Exemption Was Applicable to the Municipal Action Challenged Here.

In *Lafayette*, this Court held that "[t]o the extent that the actions of a State's subdivisions are the actions of the State, the *Parker* exemption applies." (Slip Op. at 17 n. 33.) Part III of the plurality opinion explains that the acts of a municipality are deemed the acts of the State itself when the "State [has] *authorized* or directed a given municipality to act as it did . . . ." (Slip Op. at 24; emphasis supplied.) In adopting the analysis of the Fifth Circuit, the plurality made clear that such authorization or direction "exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" (Slip Op. at 25, *quoting* 532 F.2d at 434.) The plurality expressly disclaimed a restrictive reading of this standard, explaining that a municipality need not be able "to point to a specific, detailed legislative authorization" for each act. (Slip Op. at 25.) Indeed, the plurality explicitly rejected as "hyperbole" the dissent's assertion that this standard would "'impair the ability of a State to delegate governmental power broadly to its municipalities.'" (*Id.*)

As more extensively set forth in the Petition (at 3-9), in this case the "action complained of" is the *leasing* of Commonwealth Doctors Hospital ("Commonwealth") by the County-created IDA to the County-created FHA for operation by FHA as part of the County's areawide, multi-facility, non-profit public health care system. As recognized by both the Court of Appeals below (App. 8a) and the District Court (App. 33a-34a), the Fairfax County Board of Supervisors created IDA by ordinance and expressly directed it to acquire Commonwealth and

lease it to FHA. It is thus apparent that the "complained of" leasing "derive[s] its authority and its efficacy from the legislative command"[1] of the Fairfax County Board of Supervisors. Accordingly, under the analysis adopted in *Lafayette*, the precise question presented in this case is simply whether the Fairfax County Board of Supervisors was properly "authorized" by the Virginia legislature to create IDA and command it to lease Commonwealth to FHA. As the District Court below stated, "if the lease is an exercise of the state acting as sovereign it is immune from federal antitrust attack." (App. 34a.)

Petitioners submit that the District Court's affirmative resolution of this question is indisputably correct. As the governing body of Fairfax County, the Fairfax County Board of Supervisors has undoubted delegated powers to provide adequate and efficient hospital and health care facilities for the citizens of Fairfax County. As the District Court stated, "[t]he State of Virginia has long recognized that private enterprises may not provide adequate hospital and medical care to the public and has authorized cities and counties to form health and hospital authorities and commissions for the purpose of providing adequate public hospital and medical care" (App. 34a), *citing* the Hospital Authorities Law, Va. Code § 32-212 *et seq.* (Supp. 1977) (App. 67a) and the Hospital or Health Center Commissions Act, § 32-276 *et seq.* (Supp. 1977) (App. 57).

Pursuant to the express powers delegated to the County under the Hospital or Health Center Commissions Act, the County has established over the years a coordinated public health care system in Fairfax County, run by FHA. The District Court found that "[i]n 1947 the County of

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[1] *Parker* v. *Brown*, 317 U.S. 341, 350 (1943).

Fairfax, *pursuant to State mandate*,[2] established a Hospital and Health Care Commission" which in turn established defendant FHA in 1955 "to operate public health facilities within the County," including Fairfax Hospital which was completed in 1960.[3] (App. 34a; emphasis supplied.) The District Court further found that since the establishment of FHA, "the County Board of Supervisors has sought to create a county-wide system of public health services." (App. 34a.) Pursuant to this goal, in 1967 the voters of Fairfax County "approved a bond referendum providing funds for the development by the County of a multi-hospital system of health care facilities, all of which were to be operated by the FHA." (District Court Opinion, App. 27a-28a.) These funds have been used to construct Mount Vernon Hospital and the ACCESS ambulatory health care facility in Reston,

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[2] *See* Hospital or Health Center Commissions Act, Va. Code § 32-277 (1973), which provides that the governing body or bodies in each city, county and town:

> may adopt a resolution declaring that there is need for a hospital or health center commission in such political subdivision or subdivisions, if it or they shall find that the public health and welfare . . . in such subdivision or subdivisions and surrounding area *require the acquisition, construction or operation of public hospital facilities for the inhabitants thereof.* (App. 57a-58a; emphasis supplied.)

[3] *See* Hospital or Health Center Commissions Act, Va. Code § 32-280 (Supp. 1977), which provides in pertinent part:

> § 32-280. Powers of commission.—Any hospital or health center commission established hereunder shall have all powers necessary or convenient to carry out the general purposes of this chapter, including the following powers in addition to others herein granted:
>
> * * * *
>
> (11) *Leases and construction agreements.*—To enter into leases and agreements with persons, firms, corporations, associations or other groups which provide for the construction and/or operation of a hospital or health center by such persons, firms, corporations, associations or other groups on land of the commission. (App. 59a, 61a.)

Virginia, both of which are owned by the County and leased to FHA for operation on behalf of the County.

In addition to the powers delegated to "each city, county and town"[4] by the Hospital or Health Center Commissions Act, the Virginia legislature has, through the Industrial Development and Revenue Bond Act, Va. Code § 15.1-1373 *et seq.* (Supp. 1977) (App. 39a), sought to promote the health and welfare of the citizens of the Commonwealth by empowering counties and other municipalities to create industrial development authorities. As amended in April 1977,[5] Section 15.1-1375 of the Act sets forth the purposes of the Act and states in pertinent part:

> It is the . . . *intent of the legislature and shall be the policy of the Commonwealth* to grant to industrial development authorities the powers contained herein with respect to medical facilities . . . *to the end that such authorities may protect and promote the health and welfare of the inhabitants of the Commonwealth by assisting in the acquisition*, construction, equipping, expansion, enlargement and improvement of medical facilities . . . *in order to provide modern and efficient medical services to the inhabitants of the Commonwealth* . . . and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare. *It is not intended hereby that any such authority shall itself be authorized to operate any such medical facility* . . . . (App. 43a; emphasis supplied.)

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[4] Hospital or Health Center Commissions Act, Va. Code § 32-276 (1973) (App. 57a).

[5] 1977 Va. Acts, Chapter 619.

To serve these purposes, Section 15.1-1376 of the Act authorizes the governing body of any municipality [6] to create by ordinance an industrial development authority which is deemed "*a political subdivision of the Commonwealth*, with such public and corporate powers as are set forth in this chapter." (Emphasis supplied.) Section 15.1-1376 further provides that "[a]ny such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter . . . ." (App. 43a-44a.) Section 15.1-1378 of the Act expressly spells out the powers of an industrial development authority [7] as including the power "*to acquire* whether by purchase, exchange, gift, lease or otherwise . . . one or more authority facilities." (15.1-1378(d); emphasis supplied; App. 45a.) Industrial development authorities are also empowered "*to lease to others* any or all of its facilities . . . ." (15.1-1378(e); emphasis supplied; App. 45a.) The Act specifically defines such authority facilities as including "any or all medical (including, but not limited to, office and treatment facilities) . . . now existing or hereafter acquired . . . for lease or sale by the authority pursuant to the terms of this chapter." (15.1-1374(d); App. 39a.) These facilities may not be operated by the authority itself since the legislature of Virginia has provided that "[i]t is not intended hereby that any such authority shall itself be authorized to operate any such medical facility . . . ." (Va. Code 15.1-1375 (Supp. 1977); App. 43a.)

[6] "Municipality" is defined by Section 15.1-1374(b) of the Act as meaning "any *county* or incorporated city or town in the Commonwealth . . . ." (App. 39a; emphasis supplied.) The Fairfax County Board of Supervisors is the governing body of Fairfax County. Va. Code §§ 15.1-6(1), 15.1-7 (1973); *Board of Supervisors* v. *Alexandria Water Co.*, 204 Va. 434, 438, 132 S.E.2d 440, 442 (196?).

[7] As the District Court below noted (App. at 34a), Virginia law establishes that the powers of an industrial development authority are "legislative powers and their exercise is a legislative function." *IDA* v. *LaFrance Cleaners & Laundry Corp.*, 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975).

The Industrial Development and Revenue Bond Act establishes beyond doubt that it is the "intent of the legislature" and the "policy of the Commonwealth" to delegate to the Fairfax County Board of Supervisors the power to create, as it did in this case, an industrial development authority for the purpose of "assisting in the acquisition . . . of medical facilities" where the Board of Supervisors determines that the authority would help "provide modern and efficient medical services to the inhabitants of the Commonwealth . . . ." Industrial Development and Revenue Bond Act, Va. Code § 15.1-1375 (Supp. 1977); App. 43a.) Indeed, the Virginia Supreme Court has held that, in creating an industrial development authority such as IDA, a municipality acts in a legislative capacity and as "the legislative arm of the state." *IDA* v. *Suthers*, 208 Va. 51, 55, 155 S.E.2d 326, 330 (1967). Given these express manifestations of legislative policy and given the long-standing, indisputably proper role played by the County and FHA in providing public health care facilities, it is clear that the District Court properly concluded that "[t]he lease by the IDA to the FHA . . . is part of a state mandated program providing for the public health, an act within the police power of the states and clearly an act of sovereignty shielded from antitrust attack." (App. 34a.) [8]

[8] In so holding, the District Court expressly relied on the reading given *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) by the Third Circuit in *Duke Co.* v. *Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975). The District Court thus held that the requisite legislative intent for a municipality to engage in anticompetitive activities "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." (App. 33a.) In *Lafayette*, the Fifth Circuit recognized that its analysis was "in accord with that of the Third Circuit in *Duke & Co.* v. *Foerster, supra*, 521 F.2d at 1279-80." (532 F.2d at 434 n.8.) It is thus clear that the

B. The Court of Appeals Applied A Legal Standard In Conflict with that Affirmed By This Court In *Lafayette.*

As noted in the Petition (at 15-18), in reversing the District Court, both Judge Wyzanski and Judge Widener rejected the legal standard employed by the Fifth Circuit in *Lafayette* and adopted by the District Court. Focusing first on FHA, Judge Wyzanski would require proof "that the Commonwealth of Virginia *compelled* FHA" to lease Commonwealth from IDA. (App. 7a; 562 F.2d at 284; emphasis Judge Wyzanski's.) Turning then to IDA, Judge Wyzanski reasons that, even though IDA is itself a political subdivision of Virginia, the leasing by IDA challenged here cannot constitute state action because "the particular October 28, 1974 ordinance of the Fairfax County Board of Supervisors [cannot be treated] as analogous to a legislative coercive command nor to a legislative regulation of private conduct." (App. 9a; 562 F.2d at 285.) Under *Lafayette*, this analysis is clearly erroneous.

First, by focusing on the identity of the named defendants, Judge Wyzanski loses sight of the challenged activity itself. Stated simply, under the Industrial Development and Revenue Bond Act, the leasing transaction challenged here could not have taken place without the legislative decision of the Fairfax County Board of Supervisors to create IDA with instructions to acquire Commonwealth and lease it to FHA. Thus, it is this decision by the Board of Supervisors which must be deemed the "action complained of," and it is this decision which must be judged under the standard enunciated in *Lafayette. See Mobilfone of Northeastern Pennsylvania, Inc.* v. *Commonwealth Telephone Co.*, 1978-1 CCH Trade Cas. ¶ 61,873 at 73,664 (3d Cir. 1978) ("the current teaching

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standard employed by the District Court is the same as the standard affirmed by this Court in *Lafayette*. Accordingly, no purpose would be served by a remand to the District Court to apply *Lafayette*.

of the Supreme Court is that state officer status *vel non* of the defendants is only a factor in considering the application of *Parker*, not the controlling determination").[9]

Second, Judge Wyzanski further errs in requiring proof that a municipality, such as the County or IDA itself, was *coerced* by the state legislature. Under *Lafayette*, a municipality's actions are deemed those of the state where "the State *authorized* or directed a given municipality to act as it did. . . ." (Slip Op. at 24; emphasis supplied.) As demonstrated, in this case the requisite legislative authorization for the challenged leasing transaction is all-apparent. Indeed, it is difficult to conceive of a more specific or detailed statement of legislative policy and authorization than that set forth in the Industrial Development and Revenue Bond Act.

While expressly disagreeing with Judge Wyzanski's ruling that municipalities may act only at the compulsion of the legislature, Judge Widener would hold that municipal activities must not only be supported by an adequate state mandate, but must also satisfy "one of the analyses set forth in *Cantor*." (App. 16a; 562 F.2d at 288.) Thus, by relying on the test employed in *Cantor*, Judge Widener would evaluate municipal action by much the same standard by which purely private conduct was judged in *Cantor*.

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[9] The essential nature of the challenged activity is further illustrated by the relief requested by plaintiffs, *i.e.*, an injunction prohibiting the leasing transaction. Since IDA is a political subdivision of the state and since its actions were directed by the County which acted under express legislative authorization, it seems clear that IDA, as lessor, is entitled to the *Parker* exemption and could not be enjoined. Yet, the state's policy, as expressed in the Industrial Development and Revenue Bond Act and the Hospital or Health Center Commissions Act, would be just as effectively frustrated if FHA, as lessee, was enjoined. Thus, if the County's decision to lease Commonwealth to FHA was properly authorized by the Virginia legislature, it would make little sense to treat the lessor differently than the lessee.

It is apparent that Judge Widener's reliance on *Cantor* is in conflict with the reasoning of the Fifth Circuit affirmed by this Court in *Lafayette*. As the plurality recognized, the highly restrictive test applied in *Cantor* is not apposite where the "action complained of" is that of a municipality:

> *Cantor's* analysis is not, however, necessarily applicable here. *Cantor* was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as an agent of the State. (Slip Op. at 21, n.40.)

Indeed, by requiring that the analysis of *Cantor* be satisfied in this case, Judge Widener imposes a standard more stringent than that recognized as appropriate by any member of this Court.[10]

Petitioners respectfully submit that summary reversal is particularly appropriate in the circumstances presented by this case. In submitting their cross-motions for summary judgment on the state action issue, all parties expressly represented to the District Court that "there are no disputed facts and that the matter is ripe for decision." (District Court Opinion, App. 27a.) In holding

[10] In his concurring opinion, Mr. Chief Justice Burger states that he would require that the State not only compel the anticompetitive activity, but that the activity be essential to a State's regulatory scheme. (Slip Op. at 8-9 n.6.) However, the Chief Justice also makes clear that this test is applicable only where the municipality is operating in a proprietary capacity and not "in the area of traditional government functions." (Slip Op. at 7.) Since the operation of public hospitals and health care facilities has long been a traditional governmental function, it is apparent that Mr. Chief Justice Burger's analysis is not applicable to the leasing challenged here.

for petitioners on this issue, the District Court properly applied the correct legal standard affirmed by this Court in *Lafayette*. The rejection of this legal standard by the Court of Appeals is "so clearly erroneous as to make oral argument a waste of time." R. Stern & E. Gressman, *Supreme Court Practice*, § 5.12 at 220 (1969). In these circumstances, summary reversal is appropriate. *See, e.g.*, *Mason* v. *City of Biloxi*, 385 U.S. 370 (1966); *Johnson* v. *Virginia*, 373 U.S. 61 (1963); *United Rubber, Cork, Linoleum & Plastic Workers* v. *N.L.R.B.*, 362 U.S. 329 (1960); *Rogers* v. *Calumet National Bank of Hammond*, 358 U.S. 331 (1959).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition and in the Reply of Petitioners to Respondents' Memorandum Opposing Certiorari, this Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

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